

EDITOR'S NOTE

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No. 86-228-CFX
Status: GRANTED

Title: Juozas Kungys, Petitioner
v.
United States

Docketed:
August 9, 1986

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Williamson, Donald J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1986	G	Petition for writ of certiorari filed.
2	Aug 9 1986		Appendix of petitioner Juozas Kungys filed.
4	Sep 11 1986		Order extending time to file response to petition until October 9, 1986.
5	Oct 9 1986		Brief of respondent United States in opposition filed.
6	Oct 8 1986		Brief amicus curiae of Ukrainian American Bar Assn. filed.
7	Oct 15 1986		DISTRIBUTED. October 31, 1986
9	Nov 3 1986		REDISTRIBUTED. November 7, 1986
10	Nov 10 1986		Petition GRANTED. *****
12	Nov 14 1986		Order extending time to file brief of petitioner on the merits until January 12, 1987.
13	Dec 24 1986		Record filed.
14	Dec 24 1986		Certified copy of original record, 2 boxes, received.
15	Jan 10 1987		Lodging received. (10 copies).
16	Jan 12 1987		Joint appendix filed.
17	Jan 12 1987		Brief of petitioner Juozas Kungys filed.
19	Feb 5 1987		Order extending time to file brief of respondent on the merits until March 4, 1987.
20	Mar 4 1987	G	Motion of World Jewish Congress for leave to file a brief as amicus curiae filed.
21	Mar 4 1987		Brief of respondent United States filed.
22	Mar 4 1987	G	Motion of Anti-Defamation League of B'nai B'rith, et al. for leave to file a brief as amici curiae filed.
23	Mar 13 1987		CIRCULATED.
24	Mar 11 1987		SET FOR ARGUMENT. Monday, April 27, 1987. (2nd case).
25	Mar 23 1987		Motion of World Jewish Congress for leave to file a brief as amicus curiae GRANTED.
26	Mar 23 1987		Motion of Anti-Defamation League of B'nai B'rith, et al. for leave to file a brief as amici curiae GRANTED.
28	Apr 11 1987	X	Reply brief of petitioner Juozas Kungys filed.
29	Apr 15 1987	D	Motion of petitioner for leave to file a reply brief to the briefs of the amici curiae filed.
30	Apr 27 1987		Motion of petitioner for leave to file a reply brief to the briefs of the amici curiae DENIED.
31	Apr 27 1987		ARGUED.

AUG 9 1986

JOSEPH R. SPANIOLO, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

*Respondent.***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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3518

QUESTIONS PRESENTED

1. Which, if any, of the several conflicting and divergent formulations interpreting the "second prong" of *Chaunt v. United States*, 364 U.S. 350 (1960), governs the heavy burden of proving a "material" misrepresentation in order to denaturalize a citizen?

2. As still unresolved by this Court, whether the same test or tests of materiality for revoking citizenship applies to the invalidation of a visa?

3. Whether the Third Circuit Court of Appeals misconstrued the Government's heavy burden of proving the materiality of a misrepresentation by clear, convincing and unequivocal evidence, when it held that the Government, under the second prong of *Chaunt*, need only establish a mere "probability" that an investigation would have revealed an independent "disqualifying fact" making the petitioner ineligible for a visa had the petitioner made truthful statements as to what it held were his immaterial date and place of birth under the first prong of *Chaunt*?

4. Whether the Third Circuit's standard of plenary review, pursuant to which it made *de novo* findings and drew inferences as to unalleged "facts" directly contrary to the findings of the District Court and to the record, on whether an investigation would have ensued and whether the petitioner was ineligible for a visa, violated Rule 52(a) of the Federal Rules of Civil Procedure and deprived the petitioner of his constitutional right to due process of law?

TABLE OF CONTENTS

	<i>Page</i>
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Third Circuit's interpretation of the second prong of <i>Chaunt</i> as permitting a "probability" standard of proof for materiality in a denaturalization case conflicts with decisions and opinions of this Court and other Circuits.....	7
II. The decision below as to what constitutes "materiality" at the denaturalization and visa application stages raises important and unresolved problems affecting the "precious right of citizenship."	11

*Contents**Page*

III. The decision below violated the Fifth Amendment and Rule 52(a) of the F. R. Civ. P. and constitutes such an arbitrary threat to citizenship by the manner in which it imposed its admittedly elusive "probability" standard that this Court should exercise its power of supervision.	14
Conclusion	28

TABLE OF CITATIONS**Cases Cited:**

Anderson v. Liberty Lobby, ____ U.S. ____ (1986).....	27
Chaunt v. United States, 364 U.S. 350 (1960).....	
.....4, 5, 7, 8, 9, 10, 11, 14, 22, 25	
Dunn v. United States, 442 U.S. 100 (1979)	24
Fedorenko v. United States, 449 U.S. 490 (1981).....	
.....4, 7, 8, 9, 10, 11, 12, 26	
Francis v. Franklin, 105 S. Ct. 1965 (1985).....	22
Kassab v. INS, 364 F. 2d 806 (6th Cir. 1966).....	8
Krasnov v. Dinan, 465 F. 2d 1298 (3rd Cir. 1972).....	15
Langhammer v. Hamilton, 295 F. 2d 642 (1st Cir. 1961)	
.....	8
Madrid-Peraza v. INS, 292 F. 2d 1297 (9th Cir. 1974).....	8

Contents

	<i>Page</i>
Maikovskis v. INS, 773 F. 2d 435 (2d Cir. 1985).....	8, 10
Mullaney v. Wilbur, 421 U.S. 684 (1975)	22
Perez v. Brownell, 356 U.S. 44 (1958)	11
Pullman-Standard v. Swint, 465 U.S. 273 (1982)	15
Sandstrom v. Montana, 442 U.S. 510 (1979)	22
Schneiderman v. United States, 320 U.S. 118 (1943)	7, 9, 24
United States v. Fedorenko, 597 F. 2d 946 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981)	8, 9
United States v. Kairys, 600 F. Supp. 1254 (N.D. Ill. 1984), aff'd, 782 F. 2d 1374 (7th Cir. 1986)	25
United States v. Kowalchuk, 773 F. 2d 488 (3rd Cir. 1985), cert. denied, 106 S. Ct. 1188 (1986)....	8, 10, 11, 21, 25, 26
United States v. Koziy, 728 F. 2d 1314 (11th Cir.), cert. denied, 105 S. Ct. 130 (1984)	8
United States v. Riela, 337 F. 2d 986 (3rd Cir. 1964)	8, 10
United States v. Rossi, 229 F. 2d 650 (9th Cir. 1962)	8
United States v. Sheshtawy, 714 F. 2d 1038 (10th Cir. 1983)	8, 9, 10, 11

*Contents**Page***Statutes Cited:**

8 U.S.C. § 1101(f)(6)	10
8 U.S.C. § 1182(a)(19)	25
8 U.S.C. § 1451(a)	1
28 U.S.C. § 1254(1)	1
Displaced Persons Act of 1948, 50 U.S.C. App. (1952 ed.) § 1951 et seq.	13, 16, 25

United States Constitution Cited:

Fifth Amendment	14, 24
-----------------------	--------

Rules Cited:

Federal Rules of Civil Procedure, Rule 52(a)	14, 15, 28
Supreme Court Rule 17.1(a)	11, 14
Supreme Court Rule 17.1(c)	11

Other Authorities Cited:

Constitution of the International Refugee Organization	13, 17
Displaced Persons in Europe, Report No. 950, U.S. Senate Committee on the Judiciary	17

*Contents**Page*

Federal Register, December 24, 1946:

22 CFR § 61.313(a)(3)	23
22 CFR § 61.301, Note 119	17
22 CFR § 61.301, Note 131	23
National Law Journal, Nov. 25, 1985, p. 9, col. 1	12
The New York Times, June 20, 1986	12
Presidential Papers of Harry S. Truman	16, 23

No.

In The

Supreme Court of the United States

October Term, 1986

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

The petitioner, Juozas Kungys, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on June 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is still unreported but is printed as Appendix A.

The opinion of the United States District Court for the District of New Jersey (Debevoise, D.J.) is reported at 571 F. Supp. 1104 (App. C).

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court dismissing the complaint and remanding for denaturalization proceedings was entered on June 20, 1986 (App. B). Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) provides for revocation of a naturalized citizen's order and certificate of naturalization if they "were procured by concealment of a material fact or by willful misrepresentation" (App. D).

STATEMENT OF THE CASE

In January 1947 petitioner, then a refugee, applied to the U. S. Consulate in Stuttgart, Germany for a non-preference Quota Immigration Visa under the quota for Lithuania and in his visa application falsely stated he was born on October 4, 1913 in Kaunas, Lithuania, when in fact he was born on September 21, 1915 in Reistru, Lithuania. In support of those statements, petitioner submitted, *inter alia*, a certificate of the "Ex-Political Prisoners Committee" (Trial Exh. A-2) containing the incorrect date and place of birth and certifying that he took an active part in the Lithuanian anti-Nazi resistance movement and was persecuted by the Nazis. The District Court expressly found that the Government did not meet its burden of proof that petitioner's

participation in the anti-Nazi resistance was not true.¹

On March 4, 1948, the U. S. Consulate at Stuttgart issued to petitioner Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended. Petitioner entered the United States on April 29, 1948 upon presentation of that visa.

On October 23, 1953 petitioner executed a Petition for Naturalization (Form N-405) (Trial Exh. A-11) and again made the same misrepresentation as to his date and place of birth.

On February 3, 1954, the United States District Court for the District of New Jersey granted the petition for naturalization and issued to him a Certificate of Naturalization (Trial Exh. A-12).

On July 22, 1981 the Office of Special Investigations of the Criminal Division of the U. S. Justice Department ("the OSI") filed a five count complaint in the United States District Court for the District of New Jersey seeking to revoke petitioner's citizenship on the grounds, *inter alia*, that petitioner illegally procured his citizenship because of alleged acts of persecution and that he had made misrepresentations and concealments of material facts with respect to his date and place of birth. The

1. "7. Professor Finger also testified that in January 1947 under applicable regulations a visa applicant who had no close relatives in the United States was not eligible for a visa unless he could prove that he was a victim of Nazi persecution. The testimony and regulations in evidence in this case suggest that Professor Finger was in error on this point, although perhaps there was an informal policy at the Stuttgart consulate to prefer Nazi victims. In any event, despite the questions which the evidence raises as to defendant's claim that he participated in the resistance movement, the government's charge that these claims are false is not supported by clear unequivocal convincing evidence. Therefore, the certificate as to defendant's participation in the resistance (Exh. A-2) has not been established to be false in that respect." (App. C, 199a-120a).

complaint was amended in June 1982 to set forth matters not pertinent to this petition.

On September 28, 1983 the District Court dismissed all of the counts of the complaint, as amended, and held that "the admissible evidence is insufficient to sustain the government's charges that defendant participated in the July and August 1941 killings in Kedainiai" (App. C, 110a). The Third Circuit left undisturbed the District Court's dismissal of the counts which contained the allegations that petitioner participated in atrocities (Counts I, III) and the allegation that he illegally procured his citizenship because of lack of good moral character (Count IV).

The District Court found that had petitioner given the correct information in his visa application form, his visa nevertheless would have been issued since "There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever." (App. C, 119a). The District Court held that there was no reason not to apply the materiality tests of *Chaunt v. United States*, 364 U.S. 350 (1960) to the visa application stage and then made findings under the first *Chaunt* test as well as each of the formulations of the second prong of *Chaunt* as set forth in the various opinions in *Fedorenko v. United States*, 449 U.S. 490 (1981). The District Court found under the first *Chaunt* test that "None of the suppressed facts, if known, would have warranted denial of citizenship" (App. C, 135a), and under the minimal test of the majority in *Fedorenko*, "Disclosure of these facts would not have made defendant ineligible for a visa." (App. C, 135a). Moreover, the District Court found that petitioner's "misrepresentations and concealments would not be deemed material for Section 340(a) purposes under any of the interpretations of the second *Chaunt* test." (*Ibid.*) Finally, the District Court found, "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (Emphasis in original text, *ibid.*)

On June 20, 1986 the Third Circuit Court of Appeals, although it expressly acknowledged that "Because we agree with the district court that under the first prong of *Chaunt* the government has not established the requisite materiality, i.e. 'that facts were suppressed which, if known, would have warranted denial of citizenship,' felt compelled to 'consider the second prong in the *Chaunt* test and articulate our view of this elusive concept while remaining cognizant of its various interpretations.' " (App. A, 20a-21a). The Third Circuit then found, contrary to the express finding of the District Court, that had the petitioner made truthful statements as to his date and place of birth an investigation "would have ensued," which in all "probability" would have revealed the "disqualifying fact" that the petitioner had not been a "victim of Nazi persecution" and thus held that the Government satisfied the "second prong" of the materiality test of *Chaunt v. United States*, *supra*, and reversed the judgment of the District Court and remanded for denaturalization proceedings (App. A, 32a-33a).

The Third Circuit concluded that the "second prong" of the *Chaunt* materiality test was met notwithstanding that it noted that, "Country of birth determined eligibility under the quota system. We note that although the defendant misrepresented his place of birth, he did not misrepresent in what country he was born. Therefore, his misrepresentation, in and of itself, did not have impact on his eligibility for a quota visa in general." (App. A, 30a).

The Third Circuit reasoned that a discrepancy in the petitioner's date and place of birth as reflected in supporting documents would have resulted in an investigation of police records reflecting that petitioner had registered as a refugee with German civil authorities and obtained a residence permit (shortly before the French occupied that area) implying he resided in that farming community "without special restrictions" (as did all refugees). From that fact of residency the Third Circuit drew the inference that "This information would tend to discredit the defendant's

claim that he was persecuted by Nazi Germany." (App. A, 32a).

The Third Circuit relied on that thin inference, despite the abundant testimony from witnesses the District Court found credible that petitioner ran the risk of being executed for high treason for his activities in the anti-Nazi Lithuanian resistance thwarting conscription by the German army and with respect to his arranging the escape of himself and eight others from the German S D during flight from the Russian front [Trial testimony of Vydaudas Vidiekunas (Cir. App. pp. 916-918), Youzas Koncius (Cir. App. pp. 1396-1405), Walter Janson (App. C, 114a), and Sophia Kungys (Cir. App. pp. 1250-1252)].

The Third Circuit then gave credence to testimony, expressly rejected and discredited by the District Court (note 7, App. C, 119a-120a), by a former Vice Consul that non-preference immigration quota visas were issued only to victims of Nazi persecution.² No such regulation existed at the time petitioner obtained his visa in March 1948 as the Government conceded to the District Court (Cir. App. p. 1488). The actual regulations referred only to the order of priorities for displaced persons and were in evidence before the District Court (App. E, 140a-142a, Exhibit D-34, Federal Register, Dec. 24, 1946). Based on the unsupportable premise of a non-existent regulation recreated from a four decade old memory, the Third Circuit applied a "probability" standard of proof and reached the erroneous conclusion that not being a victim of Nazi persecution was a "disqualifying fact" making the petitioner ineligible for a non-preference immigration quota visa.

2. The Third Circuit suffered from the inherent disadvantage of not observing the demeanor of Seymour Finger who testified that the requirement of being a victim of Nazi persecution was contained in a regulation the Government attorneys' prepared him with before trial: "This policy was contained in regulations issued by the federal government under which we operated." (Cir. App. p. 583).

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's interpretation of the second prong of *Chaunt* as permitting a "probability" standard of proof for materiality in a denaturalization case conflicts with decisions and opinions of this Court and other Circuits.

Each denaturalization case since this Court's 1943 decision in *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) has stated that the Government bears the heavy burden of proving its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. Indeed, this Court as recently as *Fedorenko v. United States*, 449 U.S. 490, 505-06 (1981) stated, "Any less exacting standard would be inconsistent with the importance of the right that is at stake . . ." Unfortunately, three of this Court's opinions in *Fedorenko* set forth conflicting interpretations of the "second prong" of *Chaunt v. United States*, 364 U.S. 350 (1960), which has resulted in unabated confusion among the District Courts and the Circuit Courts of Appeals as to how to apply that heavy burden of proof to the issue of whether a naturalized citizen made "material" misrepresentations or "material" concealments of facts in obtaining his citizenship.

Although the lower courts have consistently applied a "certainty" test to the *Chaunt* formulation that "materiality" is proven by clear, unequivocal and convincing evidence if "facts were suppressed which if known, would have warranted denial of citizenship" (the so-called "first prong"), there has been a lack of consistency bordering on chaos when the lower courts have attempted to wrestle with the "elusive" further formulation in *Chaunt* that "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (sometimes characterized as the

"second prong" of *Chaunt*). At last count there are at least three conflicting tests in the various Circuits, to wit, (1) the "possibility" test of the Fifth and Eleventh Circuits (and the dissent in *Chaunt*) which construes the second prong literally; (2) the "certainty" test of the Tenth Circuit (and a minority of the Third Circuit) which adopts the explication of Justice Blackmun in *Fedorenko v. United States*, 449 U.S. 490, 522-526 (1981) that *Chaunt* contemplated only the rigorous standard that the Government "must prove the existence of disqualifying facts, not simply facts that might lead to hypothesized disqualifying facts"; and (3) the "probability" test of the Third Circuit in the instant case and the Second Circuit which in some amorphous way is more than a mere possibility but less than a certainty. *United States v. Fedorenko*, 597 F. 2d 946 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981). *United States v. Koziy*, 728 F. 2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984); *United States v. Sheshtawy*, 714 F. 2d 1038 (10th Cir. 1983); *United States v. Kungys*, ____ F. 2d ____ (3rd Cir. 1986); *United States v. Kowalchuk*, 773 F. 2d 488 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986); *United States v. Riela*, 337 F. 2d 986 (3rd Cir. 1964); *Maikovskis v. INS*, 773 F. 2d 435 (2nd Cir. 1985); *United States v. Rossi*, 299 F. 2d 650 (9th Cir. 1962); *Madrid-Peraza v. INS*, 292 F. 2d 1297 (9th Cir. 1974); *Kassab v. INS*, 364 F. 2d 806 (6th Cir. 1966); *Langhammer v. Hamilton*, 295 F. 2d 642 (1st Cir. 1961).

Although certiorari was granted in *Fedorenko* presumably to clarify how materiality was to be interpreted in light of *Chaunt*, the majority opinion declined to clarify *Chaunt*. Nevertheless, three Justices addressed the issue of the so-called second prong of *Chaunt* resulting in three different formulations, including raising a doubt as to whether *Chaunt* intended only one test for materiality. In the last twenty-five years *Fedorenko* has been the only denaturalization case in which this Court has granted certiorari and thus the need for reconsideration and definitive

formulation of what constitutes "materiality" remains to be met by this Court.

It is respectfully submitted that this case demonstrates that the possibility test and the probability test for materiality substitute speculation for proof and lead to the "hypothesized disqualifying facts," Justice Blackmun warned against in *Fedorenko*. Thus, although denominated a "probability" test, it severely dilutes the longstanding standard of proof required of the Government before it can deprive a naturalized citizen of his "precious right." It would appear that only the certainty test is consistent with the *Schneiderman* standard of the heavy burden that the Government be required to prove its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This is especially important since many recent denaturalization cases are non-jury trials in which the judges are subject to the "hydraulic pressure" of trying what are tantamount to war crimes' cases, as to which United States courts would not otherwise have jurisdiction.³ Under the circumstances, the Government's burden of proof should not be diluted to less than that required of a simple tort case.

The division among the Circuits, and indeed even within the Third Circuit, is deep and irreconcilable in the absence of a clear and definitive pronouncement by the Supreme Court. The Tenth Circuit in *United States v. Sheshtawy*, 714 F. 2d 1038 (10th Cir. 1983) rejected the mere "possibility" test of the dissent in *Chaunt*, 364 U.S. at 357, and the Fifth Circuit in *Fedorenko*, 597 F. 2d 946, 951-952 (5th Cir. 1979), and concluded that "While there has been substantial disagreement over the meaning of *Chaunt*, its characterizations by Justice Blackmun appear to us to be

3. The District Court denied petitioner's motion for a jury trial and motion to dismiss for lack of jurisdiction over war crimes. See Appellee's Brief to Third Circuit p. 1. The Third Circuit opinion did not consider those issues raised by petitioner.

correct, and until *Chaunt* as thus interpreted has been rejected or overturned by the Supreme Court, we must follow it." 714 F. 2d at 1040. This petition squarely raises this issue which is now ripe for review by this Court since the Third Circuit in the instant case stated, "Our review requires us to examine the second prong of the *Chaunt* test which has not been construed previously by this court nor explained by the Supreme Court." (App. A, 2a).

The District Court in the instant case applied each of the three formulations of *Chaunt* explicated by Justices Blackmun, White and Stevens and found that the Government did not meet its burden of proof under any of them (App. C, 136a-137a). The Third Circuit agreed with the District Court that materiality was not proved with respect to the first prong of *Chaunt* (App. A, 20a), and although it expressly adopted the view of the Tenth Circuit in *Sheshtawy* that the materiality test applies to the false testimony provisions of "illegal procurement" under 8 U.S.C. § 1101(f)(6), it nevertheless refused to follow its own opinion in *United States v. Riela*, 337 F. 2d 986 (3rd Cir. 1964),⁴ which Justice Blackmun cited to in *Fedorenko* as the source of one of the conflicting interpretations of the *Chaunt* materiality standard, 449 U.S. at 521, n.4 (App. A, 27a). Instead, the Third Circuit herein adopted the "probability" standard of the Second Circuit in *Maikovskis v. INS*, 773 F. 2d 435 (2nd Cir. 1985). In adopting the "probability" test, the Third Circuit acknowledged, "We note that the U. S. Court of Appeals for the Tenth Circuit reached

4. Chief Judge Aldisert, who wrote the majority opinion in the first *Kowalchuk* opinion of the Third Circuit (744 F. 2d 301, publication withdrawn) and a dissent in the 8 to 4 *en banc* opinion, concluded that the Third Circuit was bound by the "certainty" test of *Riela* in stating, "Other courts, including this one, require more. We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken, but that it would have uncovered facts warranting visa denial. *United States v. Riela*, 337 F. 2d 986, 989 (3rd Cir. 1964)." *United States v. Kowalchuk*, 773 F. 2d 488, 515 (3rd Cir. 1985).

a different result when faced with this issue. In *United States v. Sheshtawy*, 714 F. 2d 1038 (10th Cir. 1983), the court adopted Justice Blackmun's interpretation of *Chaunt* (as explicated in *Fedorenko*) and therefore effectively held that the second prong does not contain a separate test." (App. A, 18a-19a).

As analyzed by Chief Judge Aldisert of the Third Circuit, "The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word 'might,' as contained in *Chaunt*, then one word will wipe out an entire galaxy of settled case law." *United States v. Kowalchuk*, 773 F. 2d 488, 515 (3rd Cir. 1985).

In view of the above, it seems abundantly clear that petitioner's case directly presents an intolerable conflict among decisions of the lower courts as set forth in the certiorari guidelines of Rules 17.1(a) and (c) of the Rules of the Supreme Court of the United States and that the time is now ripe for this intrinsically important issue affecting the "precious right of citizenship" to be addressed by the Supreme Court.

II.

The decision below as to what constitutes "materiality" at the denaturalization and visa application stages raises important and unresolved problems affecting the "precious right of citizenship."

This case is intrinsically important since it directly implicates what this Court has referred to as "nothing less than the right to have rights." *Perez v. Brownell*, 356 U.S. 44, 64 (1958). For this petitioner, as well as thousands of other naturalized citizens who emigrated from countries behind the Iron Curtain, the consequences of being denaturalized and deported to the Soviet Union or one of its satellites are not only loss of freedom, but also loss of life itself, since the Soviet Union regards flight from

the Soviet Union during the "Great Patriotic War" (World War II) as an act of treason punishable by death. As reported in the New York Times edition of June 20, 1986, Fyodor D. Fedorenko, who was the petitioner before this Court in *Fedorenko v. United States*, *supra*, was sentenced to death for treason after being deported to the Soviet Union. Thus, these denaturalization cases, instituted by the Office of Special Investigation of the Criminal Division of the U. S. Justice Department ("the OSI") against naturalized citizens from the Soviet Union and the Eastern bloc countries based on accusations of war crimes emanating from Soviet sources,⁵ are tantamount to capital cases.

It is beyond mere irony that the petitioner successfully defended himself against allegations of having committed atrocities during World War II and yet could be denaturalized and deported to the Soviet Union and executed as a consequence of the innocuous conduct of misrepresenting his date and place of birth and because of the happenstance that he resided in the Third Circuit instead of the Tenth Circuit. He, along with the thousands of others, changed his date and place of birth on his temporary identification card to make himself older and thereby avoid conscription as an officer into the German armed forces.⁶ He, along with thousands of refugees from the Soviet bloc countries, fled from the approaching Red Army rather than being subjected

5. As of November 1985 there were more than 300 investigations and prosecutions being pursued by the OSI against alleged "Nazi war criminals," the jurisdiction for which is based on U. S. immigration laws. See *National Law Journal*, Nov. 25, 1985, p. 9, col. 1.

6. V. Vidiekunas testified that the Lithuanian resistance obtained temporary identification cards from underground people at Kaunas City Hall with incorrect dates and places of birth to avoid mobilization by the Germans (Cir. App. p. 906). J. Koncius testified the principal of his school in Lithuania backdated the male students' dates of birth to help them avoid conscription into the German Army (Cir. App. p. 1409).

to an equally odious totalitarian regime.⁷ He, along with numerous others, took steps to avoid being expelled from refugee camps and being repatriated to the Soviet Union as the result of "screenings" by Soviet representatives and Communist sympathizers in UNRRA (Cir. App. pp. 912, 1755-56). It is in this connection that petitioner and other Lithuanian refugees preserved their freedom by obtaining a certificate from the Ex-Political Prisoners Committee that he was active in the Lithuanian anti-Nazi resistance movement (Exh. A-2). Now, for the first time in any court, the Third Circuit has established the precedent that if the Government can prove that it is "probable" that a post World War II refugee was not a victim of Nazi persecution, his citizenship can be revoked, his visa invalidated, and he can be deported if there was also any error, even an immaterial error, on his immigration papers.

This dangerous precedent of applying a mere "probability" test of "materiality" is even more deplorable because it is based on the unwarranted inference, during an appellate court "plenary" review of an unalleged matter, that the obtaining by a refugee of a residence permit at the ending stage of a war "tended" to show that the refugee was not a victim of Nazi persecution. From that thinly inferred mere tendency, the Third Circuit reached the conclusion that it was "probable" that an investigation might

7. In its Constitution, the International Refugee Organization ("IRO"), a specialized agency related by agreement to the United Nations, recognized the plight of refugees fleeing from the Russian Front in providing, "the term 'refugee' also applies to a person, other than a displaced person as defined in section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality." Section A.1., Annex I to the IRO Constitution, signed by the United States on December 16, 1946. That definition was incorporated by reference into section 2(b) of the Displaced Persons Act of 1948.

have disclosed the hypothesized, but non-existent, disqualification that such a refugee was ineligible for a non-preference immigration quota visa.

This case thus illustrates the compelling importance of clarifying that "materiality," however formulated, must be proved by clear, convincing, and unequivocal evidence which does not leave the issue in doubt before any citizen can be denaturalized. To not grant certiorari would result in an unreversed appellate precedent which imparts an extraordinary fragility to citizenship acquired by naturalization. The OSI now has the virtually unchecked discretion to obtain revocation of citizenship based upon speculation combined with some immaterial, decades old error when it chooses to react to belated disclosures and criticisms by the Soviet Union.

III.

The decision below violated the Fifth Amendment and Rule 52(a) of the F. R. Civ. P. and constitutes such an arbitrary threat to citizenship by the manner in which it imposed its admittedly elusive "probability" standard that this Court should exercise its power of supervision.

In addition to adopting a diluted test for "materiality," the Third Circuit herein applied its "probability" test in a manner which "so far departed from the accepted and usual course of proceedings" as to "call for an exercise of this Court's power of supervision." [Sup. Ct. R. 17.1(a)]. After giving proper deference to the District Court's findings that an incorrect date and place of birth on an application for an immigration quota visa based on a correct country of origin were not "material" under the first prong of *Chaunt* (App. A, 20a), the Third Circuit made its own finding that it was "unrebutted" that discrepancies would have resulted in an investigation

21a-22a), despite the District Court's express finding that "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (App. C, 136a) (emphasis in original).

Under Rule 52(a) of the Federal Rules of Civil Procedure the Third Circuit was bound by the District Court's finding that no investigation would have resulted unless that finding was "clearly erroneous." Indeed, the Third Circuit acknowledged that, "Insofar as our review involves findings of fact made by the district court after a non-jury trial, our review is limited to the clearly erroneous standard." (App. A, 3a). The Third Circuit then erroneously proceeded to give "plenary review" to the factual elements of (a) whether an investigation would have ensued; and (b) whether, under its test, such an investigation "probably" would have discovered a hypothesized "disqualifying fact" separate and apart from the incorrect date and place of birth. While the "ultimate" fact of "materiality" may be a mixed question of law and fact that requires the application of legal principles to the historical facts of a case, the factual component of whether *an investigation would have ensued* as bearing on the ultimate fact (materiality) is subject to review only under the clearly erroneous rule. *Pullman-Standard v. Swint*, 446 U.S. 273, 286-287, n.16 (1982). The Third Circuit had previously been clear as to the standard of review as to ultimate facts, stating, "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data." *Krasnov v. Dinan*, 465 F. 2d 1298, 1302 (3rd Cir. 1972). Here the District Court reviewed the evidence, including the testimony of a former Vice Consul presented by the Government, and made the subsidiary finding that "Certainly there was nothing which would excite suspicion in the fact that defendant was born in Reistru in the year 1915."

(App. C, 136a). That finding was obviously not "clearly erroneous."

At the trial the Government called as its witness Seymour Finger, who as a Vice Consul had processed visas at the United States Consulate in Stuttgart, Germany for eleven months ending in February 1947. Former Vice Consul Finger did not interview petitioner with respect to his application for a visa which was issued in March 1948 and had never even examined his immigration file except in connection with his trial preparation (Cir. App. p. 570). Mr. Finger's testimony in 1983 as to what he would have done with respect to petitioner's application for a visa had he had doubts as to whether he was a victim of Nazi persecution and had he processed it in 1947 is at best retrospective conjecture based upon a faulty memory. No Vice Consul had the right to impose his own subjective standard or fashion a new criterion which was not embodied in the regulations governing the issuance of non-preference immigration quota visas. Congress did not delegate any authority to Vice Consuls to make informal policies not contained in the published regulations or presidential directives. President Truman's Statement and Directive of December 22, 1945 states, "Our major task is to facilitate the entry into the United States of displaced persons and refugees still in Europe." (App. F, 147a).

President Truman's Directive of December 22, 1945 remained operative for displaced persons and refugees receiving visas regardless of race, religion or nationality until the June 25, 1948 enactment of the Displaced Person's Act of 1948, which defined "eligible displaced person" in Section 2(c) to "embrace three general classes: (1) persons who were brought into Germany by the Nazis as forced laborers; (2) persons who fled to the west before the advancing Russian armies, and (3) persons, chiefly of Jewish origin, who fled from Germany or Austria during the Nazi regime and who have returned but who have not been resettled."

Displaced Persons In Europe, Report of the Senate Committee on the Judiciary, Report No. 950, p. 54. The phrase "victims of Nazi persecution" is contained in the IRO Constitution definition category 3: "the term 'refugee' also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein." Part I, Section A.3, Annex I to IRO Constitution. That IRO partial definition of refugee was incorporated into Section 2(b), "Displaced person" and Section 2(c) "Eligible displaced person" of the Displaced Person Act of 1948. Petitioner, however, was issued his non preference immigration quota visa under the quota for Lithuania in March, 1948 prior to the June 1948 enactment of the Displaced Person's Act of 1948. Even if Seymour Finger issued visas under the German and Austrian quotas only to victims of Nazi persecution, neither he, nor any other Vice Consul, could have excluded from the issuance of visas under the Lithuanian quota, refugees, such as petitioner, who fled to the west before the advancing Russian armies.¹

Mr. Finger did concede, however, that out of the 1,500 applications he processed, more than 1,000 did not have authentic birth certificates (Cir. App. p. 888), and that while he could direct

8. It would have been a clear violation of visa procedure for Vice Counsel Finger to have given preference to displaced persons who were victims of Nazi persecution to the exclusion of refugees from the Russian front. The Immigration Visa Procedure then in effect provided: "Under no circumstances should an applicant for a quota immigration visa be issued such a visa out of his proper turn with other qualified applicants in the same category, as this would have the effect of according the applicant an unauthorized preference over other qualified applicants having earlier priority." Note 119, 22 CFR 61.301.

inquiries to the displaced persons' camps, in fact he "rarely" did so (Cir. App. p. 576). Out of 30 to 35 Lithuanians' applications for visas processed by him, he made 2 or 3 inquiries to the Lithuanian representatives in the displaced persons' camps, although approximately one third of the Lithuanian applicants had certificates similar to petitioner's from the Ex-Political Prisoner's Committee (Cir. App. p. 577).

There was no need for the Third Circuit to speculate as to what an inquiry by a Vice Consul to the Lithuanian camp representative would have disclosed, since Vydaudas Vidiekunas, who signed petitioner's certificate (Exh. A-2) as Secretary of the Lithuanian Ex-Political Prisoner's Committee testified at the trial below. The District Judge, who personally interrogated the witness, noted in his findings of fact, "Vidiekunas testified, truthfully I am convinced." (App. C, 115a). Vidiekunas, a former Lithuanian lawyer, testified that after being liberated by the Allies, the Lithuanian refugees in Germany organized a society of former prisoners from Nazi camps and prisons and that he was elected Secretary. In order to protect Lithuanian refugees from being ousted from the Baltic camps as a result of "screenings" by Soviet representatives of UNRRA, his committee established a procedure for issuing certificates to Lithuanian refugees upon written proof from two witnesses that the refugee was active in the Lithuanian resistance against the Nazis (Cir. App. pp. 911-914). The petitioner applied for his certificate on February 25, 1946—11 months before he even applied for a visa and the certificate was granted on June 18, 1946, after the committee received testimony from two witnesses that petitioner, and a fellow prisonmate of Vidiekunas, organized an underground newspaper with stolen printing presses hidden in old forts outside Kaunas⁹ (Cir. App. pp. 915-917).

9. The District Court found "some independent support for defendant's claim he performed work for the resistance" in Janason's testimony that petitioner distributed to him underground newspapers urging resistance to German mobilization (App. C, 114a).

Vidiekunas further testified that petitioner's conduct in so assisting the Lithuanian resistance subjected him to the risk of being executed for high treason by the Nazis. Petitioner was one of less than 200 persons who were issued the certificate by his committee and the purpose of issuing the certificate was not to assist Lithuanians in obtaining visas to the United States (Cir. App. pp. 918-919). Vidiekunas never heard that immigration quota visas were restricted to persons who were victims of Nazi persecution (Cir. App. p. 923).

After making its *de novo* finding of fact that an investigation would have ensued as a result of the discrepancy between petitioner's correct date and place of birth in some local records¹⁰ and the incorrect date and place of birth on the visa application, the Third Circuit made the additional finding that petitioner received a residence permit to reside in the rural community of Poltringen "without special conditions." From that residence permit, the Third Circuit drew the unsupportable inference that "This information would tend to discredit the defendant's claim that he was persecuted by Nazi Germany." (App. A, 32a). Since all refugees had to register with local authorities and thereby obtained residence permits "without special conditions"¹¹ (other

10. The Third Circuit's review of the record was faulty in asserting that petitioner gave his correct date of birth to the Tuebingen authorities under the Third Reich and an incorrect date of birth to the Tuebingen authorities during the Allied occupation. Government Exh. J-13 is the original entry document, the Register of Residents from the Office of the Mayor, Municipality of Ammerbach, Tuebingen District for the Community of Poltringen and it records the same incorrect place of birth and month of October and year of 1913 set forth in petitioner's Lithuanian passport and visa application. Indeed, petitioner's correct date of birth is reflected in the post Allied occupation of Poltringen record of Oct. 1, 1945 as set forth in Exh. J-3.

11. The residence permits issued at that time by the Provincial Council for Tuebingen to foreign refugees were simple identification documents which did not even contain the words "without special restrictions." (App. H. 159a).

than prisoners of war) (Cir. App. p. 1031), the only supportable inference from the residence permit is that petitioner was a refugee who resided in that community.

The residence permit is irrelevant to whether at a prior time and place petitioner was active in the anti-Nazi resistance in Lithuania as corroborated by two trial witnesses. Moreover, the petitioner truthfully disclosed on his visa application his residence in Poltringen (a community in Tuebingen District) commencing in October 1944 (Trial Exhibit A-3). Indeed, his wife's INS "A" file contained the Tuebingen residence permit issued by that Provincial Council to foreign refugees before that community was liberated by the Allies (App. H). Those historical facts were obviously not a matter of concern to the Vice Consul who processed together petitioner's and his wife's visa applications. Nor were residence permits issued to refugees by provincial councils before the end of the war an impediment to issuing a visa for petitioner, his wife, or any other refugee.

Moreover, the presumption is that the Vice Consul followed the normal procedures required by the regulations and either was satisfied with the Tuebingen residence permit in the file or, in fact checked the municipal records in Tuebingen District for the periods before and after the Allied occupation. Presumably, the Tuebingen police would have confirmed that petitioner and his wife were issued residence permits since they were once registered there. Evidently the Vice Consul was more concerned that the police there had no record of bad conduct, than whether there were incorrect dates of birth in the records of a rural community. [There were numerous errors on the Tuebingen records including the post Allied record showing that petitioner's two brothers, Felix and Stanislaus, were born within five months of each other (Exh. J-6).] There is nothing in the regulations or the presidential directive that indicates the Vice Consul also was

required to determine if the petitioner was a victim of Nazi persecution.¹²

As noted by Chief Judge Aldisert of the Third Circuit in *Kowalchuk*, "In Germany, the state had ceased to exist. A mass of civilians, freed persons and the first waves of 13 million refugees from Eastern Europe wandered the country." 773 F. 2d at 500. The District Court found, "Defendant's flight from Lithuania and eventual settlement in Germany is best described by Youzas Koncius, who for the last 27 years has been a high school teacher in Illinois and whose testimony has the ring of complete truthfulness." (App. C, 115a). Koncius testified that he left Lithuania with petitioner and his family of eight in horses and wagons as shells were exploding on the farm of petitioner's father, that they proceeded to the nearby German border along with long columns of other refugees, that they were stopped by the German S D and forced to dig ditches at gunpoint until petitioner organized an escape, that they ultimately got as far west as possible to where the Allies would come, that shelters were established in Tuebingen County by local civil authorities, including the Catholic farm community of Poltringen, where they along with Allied prisoners of war, assisted farmers, and that there were thousands of refugees in camps in Germany (Cir. App. pp. 1396-1406).

Nevertheless, the Third Circuit ignored the findings of the District Court based on the credible testimony of Koncius,

12. Former Vice Consul Frank Schilling who processed petitioner's visa application was asked by petitioner's counsel: "Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?" and he answered: "No. That I don't remember." (Trial Exh. 38A). That Trial Exhibit was not included in the Appendix before the Third Circuit because the Government did not even raise the issue of any such requirement in its required Statement of the Issues before the Third Circuit in its Civil Appeal Information Statement, which is relied upon when preparing the Appendix in the Third Circuit.

Vidiekunas and Janson and drew its own inference from a residence permit to live as a refugee in a rural community shortly before the Allies liberated the area, that it would "tend to discredit" petitioner's claim he was "persecuted by the Nazis."¹³ Proceeding from that unwarranted inference, the Third Circuit reached the false conclusion that petitioner was not eligible for a non-preference immigration quota visa, having accepted the unsupported and unsupportable contention of Seymour Finger, based solely on a recreated 40 year old defective memory, that only victims of Nazi persecution were eligible for non-preference immigration quota visas. Thus, the absence of being a "victim of Nazi persecution" was perceived by the Third Circuit as a disqualifying fact" which somehow transubstantiated petitioner's immaterial date and place of birth under the "first prong" of *Chaunt* into a "material" misrepresentation of date and place of birth under the "probability" test for the second prong of *Chaunt* (App. A, 32a-33a). In various criminal contexts (to which these cases bear a closer resemblance than a common law civil case) this Court has repeatedly held that the use of an administrative presumption or an inference (such as from issuance of the residence permit "without special restrictions") to eliminate an element of the prosecution's proof violates due process. See *Francis v. Franklin*, 105 S. Ct. 1965 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The District Court expressly found that Seymour Finger was "in error" in contending that the regulations required that a visa applicant had to prove he was a victim of Nazi persecution to be eligible for a non-preference immigration quota visa. There

13. The evidence as to whether petitioner was a victim of Nazi persecution was presented on the issue of the credibility of petitioner and other witnesses and as to whether his anti-Nazi activities made it unlikely he would have collaborated in Nazi atrocities.

is nothing on the visa application to even suggest any such requirement. The former Vice Consul who actually processed petitioner's visa application had no recollection of any such requirement (Defendant's Trial Exh. 38A). The regulations, as published in the Federal Register on December 24, 1946 pp. 14611-14612, F.R. Doc. 46-21860, 22 CFR § 61.313(a)(3), contain no such requirement (App. E, 140a-141a), although they do indicate an order of *priority* for displaced persons. [Petitioner who fit in priority category 3(i)(c), displaced persons covered by the President's Directive of December 22, 1945, had to wait 14 months for his nonpreference visa. Note 131, 11 F.R. 14611.)] The Government, when challenged at the trial to produce such a regulation, admitted it could not produce any regulation requiring such a displaced person to be a victim of Nazi persecution (Cir. App. p. 1488).¹⁴ The Statement and Directive of President Truman of December 22, 1945 (App. F, 143a-151a) referred to in the regulations, makes no reference to any requirement that displaced persons or refugees had to be victims of Nazi persecution. To the contrary it expressly states, "This Government should take every possible measure to facilitate full immigration to the United States under *existing* quota law." (emphasis added) (148a).

Neither the complaint, nor the amended complaint, nor the statutorily required affidavit of good cause in support of those complaints, nor the pre-trial order limiting proof, alleges either that petitioner misrepresented that he was a victim of Nazi

14. When trial counsel for petitioner proffered the State Department Circular of July 8, 1947 (App. G, 152a-155a), it was rejected by the District Court on the grounds, "It is of marginal relevance." In response to trial counsel's argument, "Its only of marginal relevance if Your Honor accepts the argument that there was no such regulation about being a victim of Nazi persecution. Court: Nobody has shown it to me yet. Mr. Lynch [OSI trial attorney] have you shown me such a regulation? Mr. Lynch: No, sir." (Cir. App. p. 1488). (brackets added).

persecution during either the visa or naturalization proceeding, or that the lack of being a victim of Nazi persecution was a disqualifying fact, making the petitioner ineligible for a nonpreference immigration quota visa. Nor did the Government's Civil Appeal Information Statement, Statement of Issues, or Briefs on Appeal raise those issues. The Third Circuit's faulty *de novo* fact finding and issue creation without notice to the petitioner violate his right to due process under the Fifth Amendment. See *Dunn v. United States*, 442 U.S. 100 (1979).

Unlike the Third Circuit in the instant case, this Court has refused to consider matters outside the complaint in denaturalization cases. The Government's proof in a denaturalization proceeding is limited, as in a criminal proceeding, to matters charged in the complaint, *Schneiderman v. United States*, 320 U.S. 118, 160 (1943). There could be no clearer violation of due process of law than here where the Third Circuit has injected its own issue and developed its own false factual predicate without affording petitioner the opportunity to even put into the Trial Exhibit's Appendix on appeal exhibits which at the time of designation had no relevance to the issues the Government listed in its Civil Appeal Information Statement. Thus, the Trial Exhibits volumes of the Circuit Appendix do not contain Exhibit 38-D, the transcript of former Vice Consul Frank Schilling who actually processed petitioner and his wife's visa applications (Mrs. Kungys' file contained her residence permit from Tuebingen prior to the Allied occupation) and Exh. 54-D for identification, which is the Department of State circular, dated July 8, 1947, "Information Concerning Immigration Into the United States From Germany and Austria" showing that visas were issued to "displaced persons" and containing no requirement of being a victim of Nazi persecution (App. G). Moreover, even as to the Third Circuit's straw man issue, the Circuit Appendix did not include the deposition testimony of Walter Jensen (Dep. 40, 44-48, 54) which the trial court found was "some support

for defendant's claim he performed work for the resistance." (App. C, 114a).

That the hypothesized "Nazi persecution" requirement for a visa is a bogus revision of historical fact is further demonstrated by the District Court's review and analysis in *United States v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F. 2d 1374 (7th Cir. 1986), where it is noted that even "a German who voluntarily served in such units as the Waffen SS was eligible to be a quota immigrant." (*Id.* at 1266, n.5.)

Moreover, it cannot be argued that at the time petitioner filed his petition for naturalization in 1953 that he was required to show he was a victim of Nazi persecution. No speculative inferences can transform the inconsequential and correctable misstatements as to his date and place of birth on his naturalization petition into material, disqualifying facts under any formulation of *Chaunt*. Indeed, it is expressly noted on his 1953 petition for naturalization "investigation waived" (Trial Exh. A-11), because as the INS examiner explained field investigations were routinely waived, "Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible." (Trial Exhibit, p. 1132)

In 1952, the Displaced Persons Act was amended to require that the excluding misrepresentation by an alien in procuring his visa must be "by willfully misrepresenting a material fact." Immigration and Nationality Act of 1952, § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1982). As noted by the dissenting judge who wrote the majority *en banc* opinion in *United States v. Kowalchuk*, "The reason for the amendment is stated in H.R. Rep. No. 1365, 82nd Cong. 2d sess. reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1704 and is based on the belief that misrepresentations having no bearing on the issues involved, such as place of birth or personal data statements often made under duress to avoid repatriation,

should not serve as a basis for exclusion." 744 F. 2d at _____. These are "inconsequential nondisclosures that the Congress and the courts have chosen to absolve." (*Ibid.* citing to *Fedorenko*.)

If an incorrect date and place of birth are not material, such as to warrant revoking naturalized citizenship under *Chaunt*; and if an incorrect date and place of birth in a visa application are not material, such as to invalidate a visa under the majority opinion and Justice Blackmun's opinion in *Fedorenko*, then the Third Circuit should not be permitted to transubstantiate the immaterial into the material by creating a diluted standard it denominates as a "probability" test at the visa application stage. If anything, since the visa application stage is even more remote in time and even more subject to unsound conjecture, and hypothesis, there is an even greater need for a certainty test for materiality at the visa application stage.

The admonition of Chief Judge Aldisert to his brethren on the Third Circuit in his dissenting opinion in the *en banc United States v. Kowalchuk* decision is especially apt:

"I quickly recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during totally devastating wartime conditions, in enemy territory, over forty years ago. Indeed, this realization lies at the core of the due process issues . . . In all cases, an appellate court should adhere closely to the district court's determination of witness credibility; under these special conditions, this requirement assumes *a fortiori* proportions." 773 F. 2d at 499.

The manner in which the Third Circuit applied its so-called "probability" test for the second prong of *Chaunt* in this case,

is a clear illustration as to why this Court should not permit a dilution of the clear, unequivocal and convincing burden of proof on all the issues before a citizen can be denaturalized. It is especially important because only a certainty test can prevent a miscarriage of justice when judges have to apply the law under the hydraulic pressure* of the gruesome allegations which accompany these "material" misrepresentations cases. Indeed, the Third Circuit's opinion shows an unnecessary preoccupation with the Soviet evidence on atrocities, although it leaves undisturbed the District Court's holding that the Soviet evidence was unreliable and inadmissible.

Under the rubric of a "probability" test for materiality, the Third Circuit has reached a legal conclusion so totally devoid of evidentiary support as to amount to no evidence at all; and it has done it in a way so detached from the allegations in the pleadings and the controlling standard of review of the District Court's findings as to render this revocation of citizenship an unconstitutional deprivation of due process of law. What the Third Circuit did in this case not only seriously affects the fairness, integrity and public reputation of our public proceedings, but also engrafts a "probability" test on the standard of proof for materiality which will result in "great mischief." *Anderson v. Liberty Lobby*, ____ U.S. ____ (1986).

More than 300 investigations and prosecutions by the OSI based on allegations of atrocities emanating from Soviet sources may be impacted by this Court's clarification of what constitutes the test for "materiality" at both the naturalization and visa application stages of citizenship proceedings. They deserve a uniform standard of justice, which precludes hypothesized facts.

CONCLUSION

For the various reasons set forth herein, this petition for a writ of certiorari should be granted. If the petitioner is correct that the Third Circuit violated petitioner's constitutional right to due process of law by making *de novo* findings of fact as to unalleged matters in violation of Rule 52(a) of the Federal Rules of Civil Procedure and contrary to the findings of fact of the District Court and the record of evidence, then the judgment of the Third Circuit should be reversed and the matter remanded to the District Court for reinstatement of its judgment dismissing the complaint.

Respectfully submitted,

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August 7, 1986

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AUG 9 1986

JOSEPH R SPANIOLO, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

JUOZAS KUNGYS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

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TABLE OF CONTENTS

	<i>Page</i>
Appendix A — Opinion of the United States Court of Appeals	1a
Appendix B — Judgment of the United States Court of Appeals	38a
Appendix C — Opinion of United States District Court	39a
Appendix D — Statute Involved	138a
Appendix E — Federal Register, December 24, 1946	140a
Appendix F — Statement and Directive of President Truman, December 22, 1945	143a
Appendix G — Department of State Circular, July 8, 1947	152a
Appendix H — Tuebingen Residence Permit and Translation	156a



**APPENDIX A—OPINION OF THE UNITED STATES COURT
OF APPEALS**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NO. 83-5884

UNITED STATES OF AMERICA,
Appellant

vs.

JUOZAS KUNGYS

**Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 81-2305)**

Argued: January 7, 1986

Before: Adams, Sloviter and Mansmann,
Circuit Judges

(Filed June 20, 1986)

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OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal from a judgment in favor of the defendant, Juozas Kungys, in a denaturalization proceeding, we are asked to determine whether certain undisputed misrepresentations or concealments which were made by the defendant on his visa application and which were repeated in connection with his naturalization petition are material within the meaning of 8 U.S.C. § 1451(a) and *Chaunt v. United States*, 364 U.S. 350 (1960). Our review requires us to examine the second prong of the *Chaunt* test which has not been construed previously by this court nor explained by the Supreme Court. Because we find the defendant's willful misrepresentations and concealments concerning his identity to be material under our interpretation of the controlling standards, we reverse the judgment of the district court and remand for denaturalization proceedings.

I.

The jurisdiction of the district court was predicated upon 8 U.S.C. § 1451(a) and 28 U.S.C. § 1345. This court has jurisdiction by virtue of 28 U.S.C. § 1291 since this is an appeal from a final decision of the district court.

Appendix A

II.

Insofar as our review involves findings of fact made by the district court after a non-jury trial, our review is limited to the clearly erroneous standard. See, e.g., *Leeper v. United States*, 756 F.2d 300, 308 (3d Cir. 1985). As to questions of law, however, we utilize the "fullest scope of review," i.e., plenary review. *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

III.

The government, through the Office of Special Investigations of the Department of Justice, commenced this action pursuant to 8 U.S.C. § 1451(a) to revoke the citizenship of Juozas Kungys, who had procured a nonpreference quota immigration visa in Stuttgart, Germany in 1947, had emigrated to this country in 1948, and was naturalized in Newark, New Jersey in 1954.

In these proceedings before the district court, the government sought to denaturalize the defendant on the ground that his citizenship was illegally procured or was procured by concealment of a material fact because: (i) he allegedly participated with the armed forces of Nazi Germany in executing over 2,000 unarmed Lithuanian civilians, most of them Jewish, during July and August of 1941; (ii) he allegedly willfully concealed and misrepresented certain material facts in his visa application and in his naturalization petition; and (iii) he allegedly lacked the requisite "good moral character" as defined in 8 U.S.C. § 1101(f)(6), purportedly because he committed the aforementioned atrocities or alternately because he gave false testimony to obtain benefits under the Immigration and Nationality Act.

After trial non-jury the district court made numerous findings of fact and conclusions of law and

Appendix A

entered judgment for the defendant on all counts. See *United States v. Kungys*, 571 F.Supp. 1104 (D. N.J. 1983). The facts and background are detailed by the district court and will not be reiterated fully here, particularly since the issues upon which we resolve this matter require us to apply and interpret legal precepts rather than examine the factual findings. Given the nature of the right at stake in a denaturalization proceeding, however, it is important for the appellate court to review carefully the record in the district court, and we have done so here. See, e.g., *Fedorenko v. United States*, 449 U.S. 490, 505-06 (1981) and cases cited therein.

It was the government's principal contention that the defendant participated with occupying Nazi forces in the extermination of segments of the Lithuanian Jewish population. More specifically, in Kedainiai, Lithuania on July 23, 1941 and August 28, 1941 over 2,000 unarmed Jewish men, women and children were divided into groups, forced into a ditch, directed to undress and shot to death. Their bodies were then covered with earth and lime before the next doomed procession was forced to follow.

During the trial, in order to demonstrate the defendant's role in the Kedainiai killings, the government offered into evidence several videotaped depositions which were taken in the Soviet Union specifically for use in this case.¹ Although the district

1. Three Soviet witnesses in particular gave videotaped testimony which implicated the defendant in the Kedainiai atrocities: Vladislavas Silvestravicius, Juozas Kriunas and Jonas Dailide. The testimony of each is summarized below.

In 1941, Vladislavas Silvestravicius worked as a driver in a Kedainiai beer bottling plant. He testified that on August 28, 1941, on orders of his superiors, he presented himself to the Kedainiai police station where he picked up lime, beer and vodka. He further stated that his truck was utilized to

Appendix A

court candidly noted that, if unqualifiedly admitted, the depositions would have been sufficient to prove that the defendant was a participant in the Kedainiai murders, the district court did not admit the depositions for all purposes. These depositions were received into evidence only for the limited purpose of establishing that these atrocities actually transpired. Without the unrestricted admission of this evidence,

transport the elderly to the execution ditch referenced above. He testified that the defendant gave orders in Kedainiai on that day and that a person in a photograph shown to him for identification "resembled" the defendant.

Juozas Kriunas, who was imprisoned by the Soviet government for his part in the Kedainiai murders, testified that the defendant was a leader in a detachment which was organized to assist the occupying German forces. With respect to the July atrocities, the witness stated that the defendant told him of the defendant's personal participation in the shootings. Kriunas further testified from personal observation that on August 28, 1941, the defendant ordered the victims in the vicinity of the pit to undress and participated in shooting them with his own pistol. Curiously, however, Kriunas could not identify a photograph of the defendant taken during the war.

Jonas Dailide, at the time of the German invasion, was a boarder in the same rooming house as the defendant. Dailide, who was never charged for his participation in the Kedainiai events, told two entirely different accounts of what transpired in Kedainiai on August 28, 1941. Initially, he testified that the defendant was in charge of a detachment which guarded the perimeter of the pit, that is, the "surrounding area," not the "shooting place." Subsequently, after Dailide was shown a Soviet protocol which he had signed in 1977, he changed his story, asserting that which was contained in the protocol was the "true evidence." More specifically, in conformity with the protocol, he testified that the defendant was directing the shooting (armed with a pistol) in the area of the ditch ("the shooting place"). Dailide was also unable to identify the defendant in a wartime photograph, stating only "It resembles Kungys."

Appendix A

the district court concluded that the government had not met its burden of proof with respect to establishing the defendant's participation in these war crimes.

In refusing to admit the Soviet depositions other than for the limited purpose of demonstrating that the Kedainiai killings took place, the district court reasoned that the depositions were unreliable. The court held that their admission "would violate fundamental considerations of fairness," given the totality of the circumstances. 571 F.Supp. at 1123. We do not reach this evidentiary issue and therefore do not determine whether the defendant was a participant in the killings. Even with the exclusion of the Soviet depositions insofar as they implicate the defendant, we find the presence of sufficient evidence in the trial record to resolve the denaturalization issue.²

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2. Albeit in a different context, we have previously stated that the reliability of depositions taken in foreign countries should be judged on an individual basis. See, e.g., *United States v. Wilson*, 601 F.2d 95, 98 (3d Cir. 1979). In any event, we reject the suggestion that all depositions taken in the Soviet Union should be automatically excluded from evidence. Accord *United States v. Schuk*, 565 F.Supp. 613, 615 (E.D.Pa. 1983); *United States v. Linnas*, 527 F.Supp. 426, 433-34 & n.16 (E.D.N.Y. 1981); *United States v. Osidach*, 513 F.Supp. 51, 58 n.2 (E.D.Pa. 1981). See also *United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981) (refusing to prevent taking of depositions in Latvia). Cf. *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (in banc), cert. denied, 106 S.Ct. 1188 (1986) (Soviet-source depositions used); *United States v. Kozly*, 540 F.Supp. 25 (S.D.Fla. 1982), aff'd, 728 F.2d 1314 (11th Cir. 1984), cert. denied, 105 S.Ct. 130 (1984) (Soviet-source depositions used); *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986) (Soviet-source depositions used). We note, however, that the U.S. Court of Appeals for the Ninth Circuit took a different approach in *Laipenieks v. INS*, 750 F.2d 1427, 1433 (9th Cir. 1985) and reached the same result as the district court judge in the case *sub judice* when it questioned the trustworthiness of Soviet-source depositions.

Appendix A

At trial, the government also contended that Kungys' citizenship should be revoked because he made false statements in the course of applying for entry into the United States and for citizenship. The government produced evidence that the defendant was born in Reistru on September 21, 1915, that he entered military service in 1938, which he left with the rank of junior lieutenant in late 1939, that he worked with the Bank of Lithuania in Kedainai from December 1, 1939 until mid-October 1941, that he moved to Kaunas thereafter, that in October 1944 he and his wife left Lithuania as the Soviet Army advanced thereon and moved to the Tuebingen region in Germany, which was then still under control of the Nazis, that Kungys applied for and received permission from the German authorities to reside in Tuebingen without special restrictions, and that his wife applied for permission to practice dentistry. Although records in Tuebingen accurately stated Kungys' true date and place of birth, when he applied for a visa application at the United States Consulate, his submissions included a forged Lithuanian Identity Card and a false birth record obtained from the Vatican representative in Germany.

The district court found, contrary to the defendant's claims, that he was a member of the Sauliai, a local Riflemen's association. This was an organization which gave military training to its members and which served as an auxiliary police force, assisting the German occupation.

The district court also found that the defendant misrepresented and concealed certain facts when applying for a visa and when petitioning for citizenship. It found, however, that these were not material. We note that the defendant initially denied making any such misrepresentations or concealing such information. The trial court, however,

Appendix A

determined that that the defendant conceded that he did, and on appeal the defendant admits making the misrepresentations but argues that they are immaterial. These concern the defendant's date of birth, place of birth, wartime occupations and wartime residence. For the reasons which follow, we disagree with the district court's conclusion that these misrepresentations were not material and reverse on this ground.

Finally, the district court rejected the government's claim that irrespective of materiality, the proof that false testimony was given in connection with the naturalization process, in and of itself, is sufficient grounds to demonstrate a lack of good moral character under 8 U.S.C. § 1101(f)(6) and would support the revocation of the defendant's citizenship as illegally procured. We agree with the district court on this point.

IV.

A.

There is no question that in a denaturalization proceeding the government "carries a heavy burden of proof," *Costello v. United States*, 365 U.S. 265, 269 (1961), and that the evidence must be "clear, unequivocal, and convincing" so not to leave "the issue in doubt." *Id.*, quoting *Schneiderman v. United States*, 320 U.S. 118, 125, 158 (1943). See also *United States v. Kowalchuk*, 773 F.2d 488, 493 (3d Cir. 1985) (in banc) cert. denied, 106 S.Ct. 1188 (1986). To require less "would be inconsistent with the importance of the right that is at stake." *Id.*, quoting *Fedorenko*, *supra*, 449 U.S. at 505-06. Although the government possesses a high standard of proof, "a certificate of citizenship is not immune from challenge." *Kowalchuk*, *supra*, 773 F.2d at 493.

Appendix A

In this case, the government seeks the revocation of the defendant's citizenship under section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) (1982).³ By the express terms of the statute, in order to succeed in a denaturalization proceeding, the government must prove that the order granting citizenship was "illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation." Notwithstanding the precise language of section 1451(a), the government must demonstrate both willfulness and materiality with respect to any misrepresentation or concealment. *Fedorenko, supra*, 449 U.S. at 507-08 n.28. See also, *Kowalchuk, supra*, 773 F.2d at 495, n.8.

Here, as in *Fedorenko*, the willfulness of the misrepresentations or concealments is not at issue. As noted above, the defendant conceded before the trial court that he made these concealments. On appeal, the defendant again admits making misrepresentations or concealments, but claims they were not material.⁴ The

3. 8 U.S.C. § 1451(a) provides in pertinent part:

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . .

(emphasis added).

4. See, e.g., Appellee's Brief at 49, n.48.

Appendix A

government argues that it has proven materiality under *Chaunt* and argues additionally that under 8 U.S.C. § 1101(f)(6) materiality is not required. We examine each argument in turn.

1. Materiality Requirements of Misrepresentations or Concealments under the Second Prong of *Chaunt* and 8 U.S.C. § 1451(a).

In *Chaunt v. United States*, 364 U.S. 350 (1960), the Supreme Court had occasion to examine certain concealments made by the defendant in connection with his naturalization papers, i.e., the fact that he had been arrested for his speechmaking and handbill distributing activities more than the "critical" five years prior to the application. The *Chaunt* Court decided that the failure to disclose was not material, and in doing so, articulated a two-part materiality test, either prong of which, if demonstrated by the requisite burden of proof, could serve as the basis for revocation of citizenship:

- (1) that facts were suppressed which, if known, would have warranted the denial of citizenship or
- (2) that their disclosure might have been useful in an investigation ~~possibly~~ leading to the discovery of other facts warranting denial of citizenship.

Id. at 355. The Court also stated that the "totality of the circumstances" should be taken into consideration when assessing materiality. *Id.* at 354.

In *Fedorenko v. United States*, 449 U.S. 490 (1981), some twenty years after *Chaunt*, the Supreme Court again considered the materiality of certain concealments, but this time in the context of a visa application as well as a naturalization petition. In

Appendix A

Fedorenko, the defendant received a visa under the Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009, codified at 50 U.S.C. App. §§ 1951-1965 (1982) ("DPA"). The Supreme Court affirmed the order revoking the defendant's citizenship because his citizenship was illegally procured in that he failed to comply with the Congressionally-imposed prerequisites to citizenship. Specifically, the defendant lied about his wartime activities on his visa application, i.e., he claimed he was a farmer in Sarney, Poland during the war when in fact he was an armed guard at a concentration camp. Some thirty years later, after living in Connecticut as a "law-abiding" factory worker, the defendant applied for and obtained citizenship. His naturalization papers and sworn testimony likewise did not disclose his concentration camp service. At trial, the defendant admitted that he deliberately gave falsehoods in connection with his visa application, that he was an armed guard in a concentration camp, that he had an awareness of the atrocities, but claimed that he was forced to serve as a guard and denied that he was a participant.

The district court entered judgment for the defendant, finding that although he served as an armed guard and lied about his wartime activities, he served involuntarily. The Court of Appeals reversed, finding that the second prong of the *Chaunt* test "requires only clear and convincing proof that (a) disclosure of the true facts would have led to an investigation and (b) the investigation might have uncovered other facts warranting the denial of citizenship." *Fedorenko*, *supra*, 449 U.S. at 504 (emphasis in original; footnote omitted). The Supreme Court, in a plurality opinion, affirmed, and in doing so, construed the DPA and articulated a materiality test, but without referring to *Chaunt*:

Appendix A

At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa.

Id. at 509, also quoted in the concurring opinion, *id.* at 520 (Blackmun, J.). Consequently, because the *Fedorenko* Court did not couch its analysis in *Chaunt* terms, it did not decide if the *Chaunt* test also applies to false statements in visa applications.

The *Fedorenko* Court ultimately rejected the distinction between voluntary and involuntary service for DPA purposes. It held that the defendant's service as an armed guard in a concentration camp constituted assistance to the enemy under the DPA and that the defendant's "willful and material misrepresentations made for the purpose of gaining admission into the United States as an eligible displaced person" made him ineligible as a matter of law for a visa under the DPA. *Id.* at 514. Therefore, the Court concluded that the defendant's "failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as 'illegally procured' under 8 U.S.C. § 1451(a)." *Id.*

Justice Blackmun concurred in the result, but articulated that he had difficulty in understanding why the opinion avoided a *Chaunt* discussion because he saw no "effective difference between the standards, nor any persuasive grounds for contriving a difference." *Id.* at 520. Justice Blackmun was concerned that the failure to term the test as one under *Chaunt* would risk confusion. Justice Blackmun stated:

Confusion to some extent is already present. We granted certiorari in this case primarily to resolve conflicting interpretations of the *Chaunt* materiality standard. Compare *United States v.*

Appendix A

Riela, 337 F.2d 986 (CA3 1964),⁵ and *United States v. Rossi*, 299 F.2d 650 (CA9 1962), with *Kassab v. Immigration & Naturalization Service*, 364 F.2d 806 (CA6 1966), and *Langhammer v. Hamilton*, 295 F.2d 642 (CA1 1961).

449 U.S. at 521, n.4 (emphasis added; footnote added).

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5. We need not discuss the vitality of *Riela* after *Fedorenko* (or after *Kowalchuk*) because we find its facts to be distinguishable as *Riela* turns on the defendant's failure to meet the Congressionally-imposed prerequisites to citizenship. In *Riela*, this court affirmed the judgment of the district court which canceled the defendant's certificate of naturalization, finding that he failed to meet the prerequisites to lawful admission. The defendant had entered this country as a stowaway, which made his admission and subsequent presence unlawful. Additionally, in his preliminary naturalization papers he misrepresented his date of birth, place of birth, and his date of arrival. He further misrepresented that he entered through Ellis Island, that he paid a head tax, that he was a cabin passenger, that he traveled on a passport and that he intended to meet someone who was apparently unknown to him. In later documents he continued the misrepresentations.

After finding "knowingly false" statements contained in the "various documents," the *Riela* court examined the materiality issue. In doing so, it applied the first prong of *Chaunt*, but did not expressly state which facts it relied upon:

There can be no doubt that the defendant, in every document filed, gave false answers to pertinent questions with the willful intent to deceive. The answers were material because they resulted in the suppression of facts which, if known, would have barred the naturalization of the defendant because of his obvious failure to meet the statutory requirements.

Appendix A

Justice Blackmun also speculated that the Court's reluctance to rely expressly on *Chaunt* is a result of the confusion concerning whether *Chaunt* did in fact create two separate standards, notwithstanding its use of the disjunctive. Justice Blackmun expressed doubt as to whether there is really a second test (the "so-called second test"). *Id.* at 524. He was concerned that if a weaker approach were taken under prong two, "the valued rights of citizenship [would be] in danger of erosion." *Id.* at 526.

Justice White filed a dissenting opinion in which he articulated his conviction that *Chaunt* does encompass two separate tests and that under the second test the government need only prove that an investigation prompted by a truthful answer "might have led to the discovery of facts justifying the denial of citizenship." *Id.* at 528 (emphasis in original). Contrary to Justice Blackmun's interpretation, Justice White felt that to require the government to demonstrate materiality by showing that an investigation precipitated by the truth would have revealed facts justifying denial of the petition would encourage applicants to conceal the truth.

Justice Stevens also dissented and in doing so he interpreted the *Chaunt* test to encompass three components:

The Court and the parties seem to assume that the *Chaunt* test contains only two components: (1) whether a truthful answer might have or would have triggered an investigation, and (2) whether such an investigation might have or would have revealed a disqualifying circumstance. Under this characterization of the *Chaunt* test, the only dispute is what probability is required with respect to each of the two components. There are really three inquiries, however: (1) whether a

Appendix A

truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. . . . Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated.

Id. at 536-37.

Consistent with Justice Blackmun's concern that *Fedorenko* would generate confusion, cases that have followed have reached different conclusions concerning the materiality requirements under *Chaunt*.

In *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (in banc), cert. denied, 106 S.Ct. 1188 (1986), we upheld the district court's order revoking the defendant's citizenship and canceling his certificate of naturalization and did so by applying the materiality test contained in the first prong of *Chaunt* to misrepresentations made at the visa stage.⁶ In

6. Other courts of appeals have also applied the *Chaunt* tests to visa applications. See, e.g., *Maikovskis v. INS*, 773 F.2d 435, 441 (2d Cir. 1985) and cases cited therein ("all of the Courts of Appeals that have considered the issue deem the *Chaunt* test applicable to misrepresentations in visa applications"). In cases such as this, when the misrepresentations are made at the visa stage and reiterated in the naturalization petition, we do not find any obstacles in applying the *Chaunt* considerations.

Appendix A

Kowalchuk, the defendant was issued a visa in 1949 under the DPA. The district court found that the defendant's visa was invalid as he was not a genuine refugee of concern to the International Refugee Organization and therefore was ineligible for admission into this country under the DPA. The trial court further held that the defendant obtained his visa illegally under section 10 of the DPA, 50 U.S.C. App. § 1959, because he made material misrepresentations on his visa application. The district court found that the defendant was a member of the Lubomyl, Poland militia (the "Schultzmansschaft") and that although the evidence did not demonstrate that he actually participated in the atrocities, the defendant "must have known" of them. We did not reach this issue.

In affirming, we concluded that the application of the first prong of the *Chaunt* test mandated revocation of the defendant's citizenship because had the particular facts been revealed, a visa would not have issued. Specifically:

[T]he defendant willfully concealed his voluntary membership and employment in the Ukrainian militia/police force, his residence at Lubomyl, his attendance at the special training school during the German occupation, and his voluntary flight to Czechoslovakia with the retreating German military forces.

773 F.2d at 496.

Although in *Kowalchuk* we ultimately resolved the matter on the first prong of *Chaunt*, we acknowledged the existence of the second prong and explained:

The second prong deals with a situation in which the truthful answer to a question would not by itself warrant the disqualification of the applicant. The Government may still

Appendix A

demonstrate that the misrepresentation is material if it shows that the truthful answer 'might have been useful' in an investigation of the applicant 'possibly leading to the discovery of other facts warranting denial of citizenship.' *Chaunt*, 364 U.S. at 355, 81 S.Ct. at 151.

Id. at 496.

In *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985), the U.S. Court of Appeals for the Second Circuit held that the defendant's concealments and misrepresentations on his visa application concerning his wartime residence and occupation were material within its definition of the second prong of *Chaunt*. While we recognize that *Maikovskis* is an alien deportation case, its interpretation of *Chaunt* is nonetheless instructive.

In applying for his visa under the DPA in 1953, Maikovskis stated that from December 1941 to October 1944, he was a bookkeeper in Riga, Latvia. The truth was that he was a chief of police for a Nazi-dominated police force in Rezekne, Latvia, a Nazi-occupied area during that period. Moreover, through the defendant's own testimony at his deportation hearing, it was established that he had assisted the Nazis.

In interpreting prong two of *Chaunt*, the court of appeals noted three possible tests under which materiality could be proven by the government, *i.e.*, whether the concealments or misrepresentations would have led to the discovery of disqualifying facts under a "might possibly," a "reasonable probability" or a "certainty" standard. Without deciding if the "might possibly" test would be adequate, the court chose the "reasonable probability" over the "certainty" standard. In doing so the court stated:

If material facts have successfully been concealed in the visa application documents,

Appendix A

either by nondisclosure or by affirmative misrepresentation, the concealment has deprived the government of the opportunity to make an investigation into the alien's actual circumstances at a time when the truth would have been more easily discoverable. Thus, application of a certainty standard would encourage the alien to conceal material information in his visa application documents and reward him for the initial success of his nondisclosure. We conclude that once it has been shown that the alien made misrepresentations in his visa application, the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa.

Id. at 442.

In applying its "reasonable probability" standard, the *Matkovskis* court concluded that the defendant's failure to disclose his police service was material because knowledge of his position at the time of his visa application probably would have resulted in the discovery of his role with Nazi forces in arresting citizens and burning their village, which would have made him ineligible for a visa under the DPA. Moreover, the evidence demonstrated that knowledge that any applicant served in the Latvian police force would have triggered an investigation to determine whether the individual assisted in the persecution.

We note that the U.S. Court of Appeals for the Tenth Circuit reached a different result when faced with this issue. In *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983), the court adopted Justice Blackmun's interpretation of *Chaunt* (as explicated in

Appendix A

Fedorenko) and therefore effectively held that the second prong does not contain a separate test.

In *Sheshtawy*, the defendant was arrested for concealing stolen property after he filed his naturalization petition but before his hearing. After his arrest, he received a standard update questionnaire from the Immigration and Naturalization Service in which he was asked whether he had ever been arrested. The defendant falsely replied in the negative. (Subsequently, the criminal charges against him were dropped.) The trial court revoked the defendant's citizenship, holding that the truthful answer to the arrest question would have resulted in a delay in his naturalization investigation and that a truthful response might have had an effect on the granting of his petition. The Court of Appeals reversed, finding that the district court erroneously utilized the standard contained in the *Chaunt* dissent.

In embracing Justice Blackmun's version, the *Sheshtawy* court rejected the argument that such an interpretation encourages lying on naturalization papers by those with "disqualifying" or "doubtful" experiences and stated:

The only group possibly affected are those who are uncertain whether a particular event would disqualify them from naturalization. We believe the *Chaunt* Court considered this tension and, in effect, concluded that even though there may be some who are encouraged to lie, the importance of putting naturalized citizenship well beyond the danger of unwarranted revocation justifies the adoption of so severe a test.

Id. at 1040-41.

The U. S. Court of Appeals for the Eleventh Circuit addressed the materiality issue on two occasions

Appendix A

although we do not find either opinion instructive here. See *United States v. Palciauskas*, 734 F.2d 625 (11th Cir. 1984), and *United States v. Kozly*, 728 F.2d 1314 (11th Cir. 1984), cert. denied, 105 S.Ct. 130 (1985).⁷

We turn now to the analysis by the district court on this issue. The district court found that the government had not proven materiality under prong one. With respect to the second prong of the *Chaunt* test, it acknowledged the different constructions and concluded that the government had not met its burden under any of them, including the least stringent of the tests, the one articulated by Justice White. Because we agree with the district court that under the first prong of *Chaunt* the government has not established that the requisite materiality, i.e., "that facts were suppressed which, if known, would have warranted denial of citizenship," we must consider the second prong in the *Chaunt* test and articulate our view of this elusive

7. In *Palciauskas*, the court affirmed the judgment of the district court revoking the defendant's citizenship because he concealed that he was the mayor of Kaunas, Lithuania during its period of Nazi occupation. Without mentioning *Chaunt* or *Fedorenko*, the court held this concealment to be material because the trial evidence clearly demonstrated that an investigation would have transpired, although his mayorship, in and of itself, would not have necessarily resulted in the denial of his visa. The *Kozly* court found that the district court's determination that the defendant's citizenship was procured by the concealment of a material fact was "not clearly erroneous" and adopted the *Fedorenko* materiality standard articulated by the court of appeals. We have some difficulty with this analysis because the materiality conclusion of the district court is not a factual finding, and as such is not governed by the clearly erroneous standard and also because the *Fedorenko* materiality standard relied upon by the *Kozly* court is not precedential since the Supreme Court chose not to affirm on that ground.

Appendix A

concept, while remaining cognizant of its various interpretations.⁸

Although we acknowledge that there is some opinion that the second prong may not contain a standard separate from the first, we have recently recognized that *Chaunt* does encompass two alternate tests. *Kowalchuk, supra*, 773 F.2d at 496. Moreover, consistent with that which we have stated in *Kowalchuk*, the second prong comes into play when a truthful answer at the time would not have necessarily resulted in denial of the application. In such a situation, citizenship may nonetheless be subject to revocation if the government is able to prove by clear, convincing and unequivocal evidence that the concealments or misrepresentation would have triggered an investigation which probably would have revealed disqualifying facts.

With respect to the investigation aspect, although there is no controlling authority which requires us to insist that the government prove that the truth at the time would have prompted an investigation, we find that this requirement is implied by the language of the second prong: "that disclosure might have been useful in an investigation . . ." 364 U.S. at 355. We further note that Justice Stevens interprets the second prong to require that the government prove that an investigation would have taken place. *Fedorenko, supra*, 449 U.S. at 537 (Stevens, J., dissenting). In any event, in the case at bar the government has demonstrated by un rebutted testimony that discrepancies between either the visa or the

8. We note, however, that had we resolved the evidentiary question in favor of admission, we would rely on the first prong of *Chaunt* since proof of participation in the atrocities would have automatically made him ineligible for citizenship.

Appendix A

citizenship application and the supporting documents would have prompted an investigation.

After the government proves that an investigation would have transpired, the court must then concern itself with where the investigation would have led. We hold that where the government is able to prove that such investigation probably would have led to the discovery of disqualifying facts, then the materiality test under the second prong of *Chaunt* is satisfied. In so holding, we do not resolve the issue of whether the materiality test under *Chaunt* is satisfied under the possibly standard, i.e., whether the government need only show that the truth at the time of the application would have prompted an investigation and that such investigation would have possibly revealed the facts which would have made the applicant ineligible. As in *Maikouskis*, the facts presented to us do not require us to determine whether the most lenient standard, i.e., the possibly standard, is sufficient. We are cognizant, however, that the express wording of *Chaunt* includes the language "might have been useful in an investigation" and "possibly leading to the discovery of other facts warranting the denial of citizenship." *Id.*

We also recognize that there are a variety of views as to the precise requirements of prong two of *Chaunt* and that a more stringent test, i.e., a certainty test would serve to make challenges to citizenship more difficult. We also note, however, that citizenship is granted only after strict compliance with the Congressionally-defined prerequisites, and that failure to give honest and truthful responses is not to be encouraged or taken lightly. Moreover, if the government is deprived of the truth at the time of the application, it is hampered in its assessment of the application at a time when the truth would have been easier to ascertain. Consequently, we hold that once an individual has obtained citizenship after

Appendix A

misrepresenting or concealing facts at either the visa or the naturalization stage, if the government can prove by clear, unequivocal and convincing evidence that these are material under the criteria set forth above, then citizenship is subject to revocation.

We do not wish to condone anything less than strict compliance with the naturalization requirements and therefore permit an approach which utilizes *Chaunt's* second prong. Contrary to Justice Blackmun's assertion, we do not feel that such a test would impermissibly endanger the "valued rights of citizenship." We acknowledge the importance of a naturalized citizen's security in retaining this precious acquisition, but we feel that the balance between that interest and the necessity for following the requirements in obtaining citizenship are met by interpreting the second prong in this fashion.

2. Materiality Requirements of False Testimony under 8 U.S.C. §§ 1101(f)(6) and 1451(a).

The government also argues that the defendant's citizenship can be revoked as illegally procured on the basis of his false testimony, regardless of materiality, under the provisions of 8 U.S.C. §§ 1101(f)(6) and 1451(a). Section 1451(a) includes a provision, added in 1961, which permits denaturalization where the "order and certificate of naturalization were illegally procured." Section 1101(f)(6) excludes from the definition of "a person of good moral character" "one who has given false testimony for the purpose of obtaining any benefits under this chapter." The government contends that because only a person of good moral character is eligible for naturalization, 8 U.S.C. § 1427(a), the defendant's action in contravention of section 1101(f)(6) renders his citizenship "illegally procured" pursuant to 8 U.S.C.

Appendix A

§ 1451(a) and merits denaturalization without considering the materiality of his statements.

The government relies in part on *Fedorenko* in which the Supreme Court explained:

[O]ur cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside. 8 U.S.C. § 1451(a); *Afroytm v. Rusk*, 387 U.S. 253, 267 n.23 (1967). See *Maney v. United States*, 278 U.S. 17 (1928); *United States v. Ness*, 245 U.S. 319 (1917); *United States v. Ginsberg*, 243 U.S. 472 (1917).

449 U.S. at 506. The government contends that this language supports its proposition that the defendant can be denaturalized on the basis of his false testimony, without regard to materiality, under sections 1101(f)(6) and 1451(a). The false testimony, argues the government, need not meet the *Chaunt* materiality test in order to constitute illegal procurement under the provisions of sections 1101(f)(6) and 1451(a). The government further submits that the district court's imposition of a materiality requirement for false testimony under section 1101(f)(6) is "clearly contradicted" by our decision in *In re Haniataki*, 376 F.2d 728 (3d Cir. 1967). The government also contends that our decision in *Haniataki* requires imposition of the provisions of section 1101(f)(6) without a requirement that the misrepresentation be material. Finally, the government argues that the legislative history of the amendment to section 1451(a) which added the illegal procurement language supports its proposition that a

Appendix A

citizen can be denaturalized for giving false testimony absent a finding of materiality. See H.R. Rep. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2982-84.

We reject the proposition that the government can avoid the *Chaunt* materiality test by alleging illegal procurement in connection with section 1101(f)(6). The language from the *Fedorenko* opinion cited by the government was included in a discussion of the countervailing values at stake when the government attempts to strip a person of the "precious" right to citizenship. *Fedorenko*, *supra*, 449 U.S. at 505. In that denaturalization action under the DPA, the Court found that because the interests of the citizen were so great, a disqualifying misrepresentation or concealment must not only be willful but must also be related to a material fact. *Id.* at 507 & n.28. While the Court was interpreting a different statutory provision than the one at issue here, our analysis reveals the Court's willingness to impose a materiality requirement before a naturalized citizen is stripped of his "precious" right on the basis of a misrepresentation.

Likewise, our decision in *Haniatakis* supports the proposition that a materiality requirement should be invoked in the denaturalization process even though it is not required in the naturalization context. In *Haniatakis*, we reversed a district court's order granting a petition for naturalization on the basis that the petitioner's misrepresentations, while not material, were sufficient to invoke the definition of good moral character provided in section 1101(f)(6) and, therefore, were sufficient to preclude naturalization. We were careful to distinguish, however, the naturalization process from that of denaturalization. We noted the Supreme Court's decision in *Chaunt* and explained:

Appendix A

[I]n Chaunt the government attempted to withdraw the privileges of citizenship from one who had already been admitted to their benefits. What is involved here, on the other hand, is the decision whether the petitioner should be admitted to the benefits of that citizenship. Much turns on this distinction, since the immigration law historically has chosen to afford greater protections to those who have been admitted to citizenship.

376 F.2d at 731. This analysis is consistent with the traditional imposition of a heavy burden on those seeking citizenship in contrast to the heavy burden on government officials seeking to denaturalize one already awarded the status of a citizen. The Supreme Court explained this distinction in *Berenyi v. District Director, INS*, 385 U.S. 630, (1967):

When the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by 'clear, unequivocal, and convincing evidence.' But when an alien seeks to obtain the privileges and benefits of citizenship, the shoe is on the other foot. He is the moving party, affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status, once granted, cannot lightly be taken away, the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship. For these reasons, it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect.

Id. at 636-37 (footnotes omitted). Because the burdens are so very different in naturalization and

Appendix A

denaturalization cases, we find that the naturalization decisions relied on by the government, including *Haniatakis* do not dictate disregard of the materiality requirement in the denaturalization context.

We also find that the legislative history of the illegal procurement amendment to section 1451(a) does not evince a clear intent of Congress to provide an escape from the materiality requirement in false testimony cases. Rather, the House Report indicates an intent to allow denaturalization based on substantive facts, where, for example, no fraud or concealment was involved, without a showing of willful misrepresentation or concealment. See H.R. Rep. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2982-84. The report indicates concern, for example, with naturalizations of those guilty of rape, fraud, and aid to illegal aliens. *Id.* at 2983. We believe Congress was concerned with cases where it was impossible to prove willful misrepresentation or concealment rather than with cases where the object of concealment was not material.

We adopt the view, heretofore articulated in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (10th Cir. 1983), and impliedly accepted in *Haniatakis*, 376 F.2d at 731, and in *Matkovskis v. I.N.S.*, 773 F.2d 435, 440-41 (2d Cir. 1985), that the *Chaunt* materiality test is invoked when the government attempts to denaturalize a citizen based on the false testimony provisions of section 1101(f)(6). We believe this disposition is consistent with the Court's decisions in both *Chaunt* and *Fedorenko*. The requirement that the government establish materiality before a citizen is denaturalized on the basis of the false testimony provisions of section 1101(f)(6) accords the proper respect for the importance of the right to citizenship discussed in *Fedorenko*. It precludes the stripping of

Appendix A

that right for minor or insignificant errors in an applicant's testimony. The materiality requirement ensures that the burden properly remains on the government to overcome the strong presumptions that attach once citizenship is conferred. While all doubts must be resolved in favor of the United States in the naturalization process, *Berenyi*, *supra*, 385 U.S. at 637, any doubts in denaturalization proceedings should be resolved in the citizen's favor. The rule adopted here is consistent with that principle. Consequently, our analysis under the "concealment of a material fact or willful misrepresentation" portion of section 1451(a) will be no different than that under the illegal procurement provision. We will not permit the government to escape the Chaunt materiality requirement by invoking section 1101(f)(6).

B.

Having articulated the applicable standard under the second prong of *Chaunt*, we now turn to the specific concealments or misrepresentations made by the defendant to assess materiality in the matter before us.

In this regard, the district court found that the defendant had misrepresented or concealed several facts on his visa application and continued the falsehoods in his naturalization petition by swearing to the truth of the information contained in the visa papers, namely, (1) his date of birth: the defendant was born on September 21, 1915 rather than on October 4, 1913; (2) his birthplace: the defendant was born in Reistru, Lithuania rather than Kaunas, Lithuania; (3) his wartime occupation: the defendant concealed the fact that from late 1939 until October, 1941 he worked as an accountant in a Kedainiai bank and that he had been a clerk-bookkeeper in a Kaunas brush and broom factory from December of 1941 to 1944 and stated

Appendix A

instead that during that period he was a student, dental technician, forestry worker and farmer; and (4) his wartime residence: the defendant concealed that he had lived in Kedainiai from 1940-1941, including the time of the July and August 1941 Kedainiai atrocities; instead he stated that he lived in Telsiai.

For the reasons which follow, we find that the misrepresentations or concealments made by the defendant about his date and place of birth are material under the second prong of *Chaunt* because had the defendant stated the truth at the time in either of his applications, the discrepancies between the application and the falsified supporting documents *would* have triggered an investigation, which in turn would have *probably* resulted in the denial of either his nonpreference quota immigration visa or his naturalization petition. We note the district court's statement that it could not "understand what benefit defendant expected to achieve by placing his birth in Kaunas rather than Reistra and by dating his birth October 4, 1913 rather than September 21, 1915 . . . as he continued to use his own name." 571 F.Supp. at 1137. Our reading of the second prong of *Chaunt*, however, does not require that we examine or ascertain motives when determining materiality.

Ambassador Seymour Maxwell Finger, a former career Foreign Service Officer, testified at the trial of this action. Ambassador Finger, now retired, served as a vice-consul to the American Consulate in Stuttgart, Germany when the defendant applied for his visa. Processing visa applications was among the duties required of vice-consuls. Ambassador Finger testified that he processed approximately 1500 visa applications in Stuttgart. Although Ambassador Finger did not process the defendant's visa application, he testified as to the uniform standards in use at the relevant time.

Appendix A

As testified to by Ambassador Finger, in Germany at the time the defendant applied for his visa, there were only two types of quota immigration visas being issued: preference and nonpreference. As is reflected on his visa, the defendant received a nonpreference visa. This type was issued only to an individual who did not have close relatives in the United States but who was a victim of Nazi persecution. Preference visas were utilized only for those with close relatives here. There is no suggestion in the record that the defendant was eligible for a preference visa.

As explained by Ambassador Finger, visa applicants would write the required information on a form, and if the application met with preliminary approval, the applicant would be scheduled for an oral interview with a vice-consul. During this interview, the visa application would be reviewed, and the applicant would be requested to swear or affirm as to the truth of the statements contained therein. Prior to signing, corrections to the application were permissible - so long as they were in the nature of an oversight rather than a deliberate misrepresentation of "something significant."

Ambassador Finger also stated that applicants were required to submit supporting documentation such as a birth certificate.⁹ When actual documents were not available, substitute documents were accepted to authenticate date and place of birth as well as identity. In the case of the defendant, substitute and supporting documents were used in his visa application. The defendant used a substitute

9. Country of birth determined eligibility under the quota system. We note that although the defendant misrepresented his place of birth, he did not misrepresent in what country he was born. Therefore, this misrepresentation, in and of itself, did not have impact on his eligibility for a quota visa in general.

Appendix A

document (Vatican birth record) which misrepresented his date and place of birth. Additionally, we note that the defendant submitted a document which also misstated his place of birth. This document was a certificate from the Lithuanian Ex-political Prisoners Central Committee ("Central Committee") dated June 19, 1946. Ambassador Finger testified that this document could be used to substitute for an actual birth certificate.

The Central Committee certificate is important for another reason as well. The certificate specifically states that the defendant was "persecuted by the Gestapo." Ambassador Finger testified that in considering visa applications, the consulate would rely upon expatriate groups such as the Central Committee to screen applicants and to determine eligibility requirements, i.e., whether the applicant had close American relatives or was a victim of Nazi persecution. We find that, by submitting this document, the defendant attempted to prove that he was a victim of Nazi persecution.

Significantly, Ambassador Finger gave un rebutted testimony concerning what would transpire if discrepancies existed between the supporting documents and the visa application. If this happened, the supporting documents would be "called into question", and there "certainly would have been an investigation." We note that the regulations in effect at the time are consistent with this testimony:

If a consular officer has reason to doubt the authenticity of a document submitted to him, he should take appropriate steps to determine whether such document may be accepted as genuine and properly issued.

22 C.F.R. § 61.329 (supp. 1946).

Appendix A

The unrefuted testimony concerning policy of an official who interpreted and administered the immigration law during the relevant period should not be ignored. *Fedorenko, supra*, 449 U.S. at 511. We find therefore that the government has established that if the defendant had been truthful on his application and submitted his falsified documents in support of his visa application, an investigation would have ensued.

We now turn, consistent with the second prong of *Chaunt*, to what the investigation probably would have revealed.

Ambassador Finger testified that immigration policy required "first check[ing] police records in any prior place of residence, particularly in Germany where such records were available." On the defendant's visa application, Kungys listed Poltrigen as a previous residence. Correspondence between district officers in Tubingen and municipal officials in Poltringen, discovered later in Tubingen by the government, reveals that Kungys lived in Poltringen without harassment, and "received a residence permit without special conditions...." This information would tend to discredit the defendant's claim that he was persecuted by Nazi Germany. As noted previously, Ambassador Finger testified that as a matter of immigration policy at that time in Germany immigration quota visas were issued only to those who had close American relatives or who had suffered persecution.

Based on this record, we conclude that truthful statements by Kungys would have led to an investigation, which in all probability would have revealed the disqualifying fact that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa. In accordance with the foregoing, we find that the government has shown by clear, convincing and unequivocal evidence that the second prong of *Chaunt* has been satisfied with respect to misrepresentations or concealments

Appendix A

made by the defendant in connection with his visa, i.e., had the defendant told the truth at the time, an investigation would have transpired which in turn would have probably resulted in the denial of his visa because it would have tended to show that the defendant was not a victim of Nazi persecution.¹⁰

With respect to the defendant's misrepresentations or concealments concerning his wartime occupations and residences, we agree with the district court that they do not pass the *Chaunt* materiality test. Unlike the situation with the defendant's birth data, these misrepresentations or concealments were not supported by falsified documents. Moreover, although we find these falsehoods to be troublesome, the evidence in the record is insufficient to demonstrate their materiality under the controlling standard. Because these misrepresentations, particularly those regarding his

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10. We note that the defendant made two attempts to contradict this view of the facts. First, his counsel contended at oral argument that Ambassador Finger's statement that only persecution victims received visas in Germany at the time was an incorrect expression of policy, citing purportedly contrary policies announced by President Truman. We note that those presidential statements speak only in general terms concerning the need to resettle displaced persons and particularly orphaned children. The papers do not address the eligibility requirements of those seeking quota visas in Germany in 1947, and in no way do they contradict Ambassador Finger's testimony as to procedures in the Stuttgart consulate.

Second, the defendant offered the testimony of Yuozas Koncius, who was 20 years old in 1944 at the time he and Kungys entered Germany together. Koncius reported that shortly after arriving, he and the defendant were confined in what appeared to be a forced labor camp, but escaped after two or three days. This isolated incident does not disturb the conclusion that truthful statements by the defendant would have led to an investigation, and that that investigation would have cast doubt on his claim of persecution.

Appendix A

wartime residences, nonetheless cause us some concern, we review this evidence.

As Ambassador Finger further testified, and as found by the district court, at the time the defendant applied for his visa, the vice-consuls were required to make specific inquiries about the applicant's adulthood residences and occupations, especially during the years 1939 to 1945. The reason for the inquiry was to determine what happened to the applicant during Nazi occupation and if the applicant had any relationship to the occupying forces. As found by the district court: "Of particular interest in the case of Eastern Europeans was the applicant's residences and occupations during the 1939-45 period, since that information tended to indicate the applicant's relationship to the Nazi occupation forces." 571 F.Supp. at 1136.

With respect to his wartime residence, we are troubled by the fact that the defendant deliberately concealed that he lived in Kedainiai at the time the July and August atrocities transpired and instead represented that he was in Telsiai - a town where a seminary is located and about which the record contains no evidence of atrocities.¹¹ Although this

11. We acknowledge that Ambassador Finger testified that the fact that an individual resided in Kedainiai would not have raised any questions to him. We also note, however, that he testified that at the time of trial, some 35 years later, he did not specifically remember the name Kedainiai. We do not assign importance to the former statement because he did not specifically remember the name and because the import of his testimony is that a key factor in eligibility was the applicant's relationship, if any, with the occupying Nazi forces. As he testified, one way to determine the nature of such a relationship was to look at the occupant's residences during the period of occupation. It is undisputed that Kedainiai, in July and August, 1941, was the site of Nazi murders and that the defendant resided there during that period.

Appendix A

causes us some concern because there is no hard evidence in the record that the consulate officials in Stuttgart had knowledge of these particular atrocities at the time the defendant applied for his visa, and the government accordingly did not prove that knowledge of the defendant's residence would have prompted an investigation, we cannot conclude that this concealment alone was material under the second prong of *Chaunt*.

With respect to wartime occupations, Ambassador Finger testified that during the period of Nazi occupation of Lithuania, probably all of its factories were Nazi-dominated. In determining eligibility of an individual who worked in one of these factories, the important questions were the capacity of employment. According to Finger's testimony, a manager of such a concern would "raise some questions" where a "slave laborer" would not. The size of the operations and the type of factory would also be relevant. The trial court held that the defendant's actual wartime occupations would not have made a difference on his visa application, and that he exaggerated the managerial aspects of his position in other documents in evidence. The district court found that he was no more than a clerk-bookkeeper. We agree that this position in a factory in a Nazi-occupied area is not one which would be considered managerial. Therefore, based upon the testimony of Ambassador Finger, we cannot find that the government has proven that the defendant's actual wartime occupation, standing alone, is material.

One final matter deserves attention. Because the Supreme Court has not specifically applied *Chaunt* to the visa stage, we will now examine the materiality of the defendant's misrepresentations at the naturalization stage, the setting wherein the Supreme Court announced the *Chaunt* test.

Appendix A

Immigration Judge Julius Goldberg, the defendant's naturalization examiner, testified before the district court. Regarding the procedure in force at that time, Judge Goldberg stated that during the required interview, applicants reviewed each question contained in the application and were given an opportunity to make corrections. Investigations were routinely waived when an examiner made the determination that the investigation would not produce anything significant. In the case of the defendant, it was Judge Goldberg who waived the field investigation. Judge Goldberg also testified, however, that had he been aware that an applicant had given false testimony to obtain a visa, such as date and place of birth as well as wartime occupations and residences, and had the applicant sworn to these falsehoods in the naturalization petition, then Judge Goldberg would have been required to recommend against naturalization.

Explaining further, Judge Goldberg testified that he would have first given the petitioner an opportunity to explain the differences. Depending on the answers given, he would direct a field investigation, refer the matter to the Immigration and Naturalization Service for a determination of what action to take, or if he determined that the false testimony was such that the applicant was not of good moral character, then he would recommend against naturalization.

From this testimony we conclude that with respect to the defendant, had he told the truth at the time he applied for his citizenship, the discrepancies between the truth and his visa materials would have resulted in either a field investigation or an outright denial of the petition. Had an investigation transpired, consistent with Ambassador Finger's testimony, such investigation probably would have resulted in a denial of the petition since it would have tended to prove his

Appendix A

ineligibility for a visa in the first instance. In this case, as previously noted, the defendant's claim of persecution by the Nazis - which is directly related to eligibility - would be called into question. Therefore, based upon the foregoing, we conclude that the government has shown that the defendant made material misrepresentations at both the visa and naturalization stages so as to justify denaturalization.

V.

For the reasons stated herein, we will reverse the judgment of the district court and will remand for denaturalization proceedings.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

**APPENDIX B—JUDGMENT OF THE UNITED STATES
COURT OF APPEALS**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 83-5884**

UNITED STATES OF AMERICA, Appellant

vs.

JUOZAS KUNGYS

(D.C. Civ. No. 81-2305)

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY**

Present: ADAMS, SLOVITER and MANSMANN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel January 7, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 12, 1983, be, and the same is hereby reversed and the cause remanded to the said District Court for denaturalization proceedings. Costs taxed against the appellee.

ATTEST:

s/Sally Mrvos

Clerk

June 20, 1986

**APPENDIX C—OPINION OF
UNITED STATES DISTRICT COURT**

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUOZAS KUNGYS,

Defendant.

Sept. 28, 1983.

W. Hunt Dumont, U.S. Atty., Newark, N.J. by Joseph F. Lynch, Jovi Tenev, Roger D. Einerson, U.S. Dept. of Justice, Washington, D.C., for plaintiff.

Williamson & Rehill by Donald J. Williamson, Newark, N.J. and Ivars Berzins, Babylon, N.Y., for defendant.

DEBEVOISE, District Judge.

This is an action which the United States, acting through the Office of Special Investigations of the Criminal Division of the United States Department of Justice, instituted against defendant Juozas Kungys pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a), seeking to revoke defendant's citizenship. Jurisdiction is properly asserted under 28 U.S.C. § 1345, 8 U.S.C. § 1421(a) and 8 U.S.C. § 1451(a).

Appendix C

A summary of the government's charges upon which the complaint is based is as follows: During the first two months after the June 1941 German invasion of Lithuania (which the Soviet Union then occupied) defendant organized and led an armed group of civilians which actively assisted the Germans in the arrest and execution of persons who had been government and communist party leaders in the District of Kedainiai during the Soviet occupation. Defendant's armed group assisted the Germans in confining the 2500 Jews of the Kedainiai District in a ghetto and then assisted the Germans in bringing these Jewish citizens to a horse breeding farm. Defendant's armed group under defendant's personal direction joined with German soldiers of Einsatzkommando 3 in bringing the Jewish captives in groups of 200-300 from the farm to a huge pit where the German soldiers and defendant and his group shot and then buried their victims in earth and lime. Thereafter, according to the government's charges, defendant moved to Kaunas where he became manager of a German controlled industrial concern. In 1944 when the Soviet Armies overran the German forces in Lithuania defendant preceded the retreating German army into Germany where he resided until his immigration to the United States in 1948.

The government charges that in the course of applying for entry into the United States and for citizenship, defendant made the following false statements:

On or about January 9, 1947 at Stuttgart, Germany, defendant executed under oath an "Application for Immigration Visa (Quota)" Number 1530 and an "Alien Registration Foreign Service Form" Number 6887153. Defendant was interviewed by a United States Vice Consul to determine his eligibility for immigration. An

Appendix C

interpreter was available to assist if needed. In order to elicit the information contained in those forms, defendant was asked questions concerning his background and wartime activities. He was then asked to ratify that information under oath in the Immigration Visa and the Alien Registration forms. In providing such information, defendant misrepresented and concealed the following facts:

a. Defendant swore that he was born on October 4, 1913, and thereby concealed the true date of September 21, 1915.

b. Defendant swore that he was born in Kaunas, Lithuania, and thereby concealed his true place of birth, Reistru, Lithuania.

c. Defendant swore that he resided at Telsiai, Lithuania during the period 1940-1942, and thereby concealed his true place of residence in Kedainiai, Lithuania during the period December 1939 to October 1941.

d. Defendant swore that he was not a criminal when in fact he had participated in the persecution and murder of over 2000 unarmed civilians.

e. Defendant swore that during the five-year period preceeding [sic] January 1947 he had been occupied as a student, dental technician and farm and forestry worker.

Appendix C

Defendant thereby concealed his now-claimed employment as a bookkeeper during the period 1942-1944.

f. Defendant represented that he was married to Sofia Kungys nee Anuskeviciute when in fact he was not.

In connection with his visa application defendant presented United States officials with a forged Lithuanian Identity Card dated April 1944 and a false birth record fraudulently obtained from the Vatican representative in Germany.

Based upon the aforementioned application, the United States Consulate at Stuttgart issued defendant on March 4, 1948 Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended.

Defendant entered the United States at New York, New York on April 29, 1948 upon presentation of the aforementioned visa. The defendant was examined by an Immigration Inspector at the Port of Entry to determine his fitness to enter the United States.

On or about May 29, 1948, defendant executed under oath an "Application for Certificate of Arrival and Preliminary Form for a Declaration of Intention" No. 119188 (Form N-300). In said form N-300, defendant misrepresented and concealed the following facts:

Appendix C

a. Defendant swore that his date of birth was October 4, 1913, and thereby concealed his true date of birth, September 21, 1915.

b. Defendant swore that he was born in Kaunas, Lithuania, and thereby concealed his true place of birth, Reistru, Lithuania.

c. Defendant swore he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 at Kaunas, Lithuania when in fact he was not.

On or about May 11, 1953, defendant executed an "Application to File Petition for Naturalization" No. 92961 and an attached "Statement of Facts for Preparation of Petition" (together comprising Form N-400). In said form defendant misrepresented and concealed the following facts:

a. Defendant swore that he had not given false testimony to obtain benefits under the immigration and naturalization laws when in fact he had given false testimony to the United States Consul at Stuttgart, Germany in order to obtain a visa and to the Immigration and Naturalization Service (hereinafter "INS") in order to obtain entry to the United States and to obtain citizenship.

b. Defendant swore that he had never committed a crime involving moral turpitude

Appendix C

when in fact he had participated in the persecution and murder of over 2000 unarmed civilians.

c. Defendant swore that his date of birth was October 4, 1913, and thereby concealed his true date of birth, September 21, 1915.

d. Defendant swore that he was born in Kaunas, Lithuania, and thereby concealed his true place of birth, Reistru, Lithuania.

e. Defendant swore that he was married on August 24, 1943 to Sofia Kungys nee Anuskeviciute in Kaunas, Lithuania when in fact he was not.

On October 23, 1953, at a naturalization examination, defendant reviewed the N-400 and swore the contents were true.

On October 23, 1953, defendant executed under oath at a naturalization examination a "Petition for Naturalization" No. 92961 (Form N-405). In said petition, defendant misrepresented and concealed the following facts:

a. Defendant swore that his date of birth was October 4, 1913 and thereby concealed his true date of birth of September 21, 1915.

b. Defendant swore that he was born in Kaunas, Lithuania and thereby concealed his true place of birth, Reistru, Lithuania.

Appendix C

c. Defendant swore that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania when in fact he was not.

On February 3, 1954, the United States District Court at Newark, New Jersey, granted defendant's petition for naturalization and issued to him Certificate of Naturalization No. 7131022.

Pretrial Order pp. 9-12.¹

Defendant denies that he ever committed any crime and in particular that he participated in any way in the killing of the communist and government leaders and the Jewish population of Kedainiai. According to him in 1939 he commenced employment with the Kedainiai branch of the Lithuanian Bank and boarded at the home of the parents of the woman who later became his wife. In July 1941, before either of the mass killings which form the basis of the government's charges, he left Kedainiai to seek employment in Kaunas. From July until the fall he was employed in a print shop there; from the fall until Christmas he was a seminarian at the Telsiai Seminary; and after Christmas he returned to Kaunas and was employed first in the print shop and then in a small, family owned factory until the summer of 1944 when the Soviet forces again entered Lithuania. He claims to have participated in the work of the anti-German resistance while in Kaunas. He further claims that upon the approach of the Soviet Army he, his wife and members of her family fled as refugees

1. During the course of this action the government withdrew its charges that defendant misstated the facts of his marriage.

Appendix C

to Germany eventually reaching what became a part of the French occupied zone.

Defendant admits that he gave false information during his immigration and naturalization proceedings concerning the date and place of his birth and concerning certain details of his employment during the period of the original Soviet occupation and the German occupation. He asserts that the false information was not material to any of the proceedings and insofar as the date and place of birth is concerned arose out of the necessity of obtaining a false identification card during the German occupation of Kaunas to avoid detection of his underground activities and to avoid mobilization into the German armed forces.

To support its most serious charges the government relies upon deposition testimony of Lithuanian witnesses taken in Vilnius with the cooperation of the Soviet authorities. Defendant contends that this testimony upon which the government relies to connect him to the killings in Kedainiai is false and is the product of a continuing effort of the Soviet Union to safeguard its hold upon the occupied Baltic states by discrediting emigres from those countries with fabricated charges that they committed war crimes during the period of the German occupation.

The case was tried without a jury. The evidence consists of the testimony of witnesses, deposition testimony, some of which was taken in this country and some of which was taken in Lithuania, and very substantial amounts of documentary evidence. I reserved decision. This opinion constitutes my findings of fact and conclusions of law.

Appendix C

I. *Historical Background*

The charges, defenses and evidential rulings in this case can be understood only in the light of the historical context in which the pertinent events took place.

For centuries Lithuania, like the other Baltic states, has been in the path of conquerors from the east and from the west, *see, e.g.,* Massie, *Peter the Great* (Alfred A. Knopf 1980); Hatton, *Charles XII of Sweden* (Weybright and Talley 1968). Once extending from the Baltic to the Black Sea, Lithuania ceased to exist as a nation altogether in 1795 at the time of the Third Partition of Poland by Russia and Prussia.

At the time of the Russian Revolution in 1917 Lithuania was occupied by Germany. It declared and achieved its independence on February 16, 1918. During the interwar years, according to documents submitted by the government in this case, Lithuania looked primarily to France and England for cultural, political and military resources.

The years 1939-40 marked the extinction once again of independent Lithuania. Nazi Germany, having absorbed Czechoslovakia's Sudetenland after the Munich Pact, occupied Czechoslovakia's principal provinces of Bohemia and Moravia on March 15, 1939. On March 23 Germany seized, without resistance, Lithuania's City of Memel. Preparations then began for the invasion of Poland, scheduled for September 1.

Seeking to avoid fighting simultaneously against major powers on the east and the west, Germany entered into negotiations with the Soviet Union. On August 23, 1939 the German-Soviet Non-Aggression Pact was signed. Discovered after the War in German

Appendix C

archives were the secret protocols in which Germany and the Soviet Union divided between them Poland and the Baltic states. At that time Lithuania was allocated to Germany, Latvia and Estonia to the Soviet Union.

Thus secured against the Soviet Union in the east, Germany attacked Poland on September 1, rapidly overcoming the Polish armed forces. On September 17, implementing the secret protocols, the Soviet Union invaded Poland. On September 28 Germany and the Soviet Union executed a German-Soviet Boundary and Friendship Treaty, establishing their common frontier in Poland. Another secret protocol added Lithuania to the Union's share of the seized territory. Later in 1939 the Soviet Union invaded Finland. In June 1940 Lithuania was occupied by and in due course incorporated into the Soviet Union. Its brief period of independence came to an end. Lithuania was a predominantly Roman Catholic country. The political and social reorganization of the nation required to transform it into a Soviet province entailed deportation of political and business leaders, intellectuals and Catholic priests.

Turning to the west, Germany conquered Denmark and Norway. This opened the way to the assault upon the Netherlands, Belgium and France in early May 1940. With the fall of France and the evacuation of the major part of the British Expeditionary Force at Dunkirk by June 4, 1940, only England stood against Germany in the west. After failing to eliminate England's air force and after cancelling plans for the invasion of England, Germany once again turned its attention to the east. It prepared to implement Operation Barbarossa—the invasion and conquest of the Soviet Union and the territories occupied by it.

The plans for Barbarossa included "special tasks" for the Reichsfuehrer SS, headed by Heinrich Himmler. These "special

Appendix C

tasks" were the implementation of Hitler's program for "Jews, communists, criminals and the insane." Proceeding from Nazi Germany's oppression of the Jewish population in Germany and the conquered countries of the west it was decided shortly before the invasion of the Soviet Union that the Jewish population in the east would be totally annihilated.²

Overall responsibility for implementation of this "special task" was assigned to the SS's Reich Security Main Office headed by Heydrich. The actual rounding up and killing of the Jewish people was to be accomplished by four Einsatzgruppen, A, B, C and D, which were mobile units equipped with vehicles and weapons. These units were to move as rapidly as possible into the newly occupied territories in the wake of the German army, performing their assigned task as they went.

Einsatzgruppen A, which had 1000 men at its peak, was assigned to Army Group North. Army Group North was to attack through the Baltic states and adjacent areas of the Soviet Union with the ultimate objective of capturing Leningrad. Commander of Einsatzgruppen A was SS Brigadefuehrer (Brigadier General) Stahlecker, author of a report (Exh. G19) which is the source of much of the information concerning the killings in Lithuania.

Each Einsatzgruppen was subdivided into subgroups called Einsatzkommando which were actually to carry out the killings.

2. I have refrained throughout this opinion from characterizing the events which must be described — the systematic, mass killings of Jewish people — limiting myself to a recital of the facts. Adjectives or expressions of horror on my part would be inadequate and an intrusion. If anyone can do justice to the dead, it must be the poet, the theologian, the philosopher, the writer, e.g., Schwarz-Bart, *The Last of the Just* (Atheneum 1961).

Appendix C

At the outset of the invasion Einsatzzkommando 1b was to operate in Lithuania. As the German Army moved into Latvia, Einsatzkommando 1b was to follow and responsibility for Lithuanian operations was to be assumed by Einsatzkommando 3 headed by SS Colonel Jager.

The procedures to be followed were worked out in advance of the invasion. For a very brief period after the Einsatzgruppen were able to move into areas secured by the advancing armies, local people were to be incited to attack and kill members of the Jewish population, thus making it appear that the killings arose spontaneously in the occupied territories. Thus Heydrich's instructions to various Einsatzgruppen commanders and others responsible for the extermination program (Exh. G2) read, in part:

I wish to make reference to and bring into recollection the statements which I already made on 17 June in Berlin.

1) No obstacles are to be created for the self purification endeavors of anti-Communist or anti-Jewish circles in the territories to be occupied in the future. On the contrary, they are to be incited and intensified if necessary, and to be directed onto the right track without leaving evidence. This is to be done in such a manner that these local "Self Protection Circles" cannot recall orders or political assurances given to them, at a later time.

Since such a procedure is only possible in the initial stages of the military occupation, because of obvious reasons, the *Einsatzgruppen* and *Einsatzkommandos* of the Security Police and the

Appendix C

Security Service in cooperation with the military offices, must act as quickly as possible to at least move into the newly occupied areas with an advance detachment, in order to bring about the requirements. Only those members of the Security Police and the Security Service who possess the necessary political flair should be selected as leaders of such advance detachments.

The formation of permanent Self Protection Units with central leadership is to be avoided initially. Appropriate local population pogroms, as outlined above, are to be incited in their place.

After a brief period of killings by local people, the extermination program was to be undertaken by the Einsatzkommando units, aided as needed by such members of the local populace as could be persuaded or forced to assist. In addition communist leaders and others who might be expected to resist the Germans were to be captured and killed.

On June 22, 1941 Germany launched a massive attack upon the Soviet Union at all points along the lengthy frontier. Army Group North moved into Lithuania and the other Baltic countries which the Soviet Union had occupied pursuant to the secret protocols to the 1939 Non-Agression Pact and Boundary and Friendship Treaty between it and Germany. Einsatzgruppen A under Stahlecker followed close at its heels.

As the Soviet occupation forces retreated, groups of Lithuanians organized to attack them and to aid in securing self rule once again. Efforts were made to establish a provisional Lithuanian government, efforts which were quickly terminated by the German authorities.

Appendix C

At the outset, at least, many Lithuanians viewed the Germans as liberators from Soviet oppression, a view which facilitated the Germans' plans to use the Lithuanians for their own ends.

Implementation of the "special task" of the Reich Security Main Office is described in the reports filed by the leaders of the Einsatzgruppen and Einsatzkommandos. Those pertaining to Lithuania were identified by the government's expert witness, Dr. Raul Hilberg, and were admitted into evidence. Their authenticity has been clearly established. In cold, bureaucratic language they describe the killing of the major portion of Lithuania's Jewish population. While they constitute evidence that Einsatzkommando 3 used local people during the course of their work, they do not refer specifically to the use of local people at the killings at Kedainiai nor do they implicate the defendant in this case in any way.

Heydrich's July 2, 1941 orders (Exh. G5) summarize the general outline of the procedures being implemented in the occupied territories:

The *Reichsführer* SS and Chief of the German Police must be *continuously* informed about all results of deployment of the Security Police and the Security Service.

. . . .

To be executed are all

officials of the Comintern (Communist International) (as well as Communist career politicians overall)

Appendix C

the senior, middle, and radical lower level officials of the Party, the Central Committee, the Regional and District commissars

Peoples Commissars

Jews in Party or state positions

other radical elements (saboteurs, propagandists, partisans, assassins, agitators, etc.).

.

No obstacles are to be placed before the self-purification attempts by anti-Communist or anti-Jewish circles in the areas to be occupied. To the contrary, they are to be promoted *without leaving evidence*, so that these local "self defense" circles cannot later lay claims to regulations or political assurances granted to them.

Since such a procedure is only possible during the initial period of a military occupation, for obvious reasons, the *Einsatzgruppen* of the Security Police and the SD have to make an effort to the furthest extent possible—in cooperation with the military agencies—to move into the particular newly occupied areas with all possible dispatch, at least with an advance detachment.

The daily consolidated situation report dated June 30, 1941 stated that "Advance detachment (of Einsatzkommando 1b)

Appendix C

moved into Kaunas on 28 June, activity taken up. . . . Lithuanian partisan groups' have already shot several thousand Jews in the last three days." (Exh. G3). Report #12 dated July 4, 1941 concerning Einsatzgruppen A (Exh. G7) stated "Two partisan groups are operating in Kaunas: a. 600 men under the leadership of KLIMAITIS, predominately civilian workers. b. A unit of approximately 200 men under the leadership of the physician Dr. ZIGONYS."

The initial stage of the extermination process in Lithuania during which the Einsatzgruppen sought to incite local groups to attack Jewish citizens is described in what will be referred to in this opinion as the Stahlecker Report (Exh. G19). The report describes particularly the killings in Kaunas, suggesting that there was more difficulty than expected in initiating a pogrom there. There is also reference in general terms to "other parts of Lithuania" where "similar actions took place according to the example set in Kaunas, although on a smaller scale." Nowhere in the Stahlecker Report or in the other reports in evidence in this case is there anything to suggest that local groups in Kedainiai had been persuaded to take action against Jewish inhabitants of the City. According to the Stahlecker Report:

In light of the consideration that the
population of the Baltic countries had suffered

3. Some confusion of terminology results from the use made of the term "partisan". Sometimes the German reports used the term to refer to the Lithuanians who joined the local auxiliary police forces to assist in maintaining order and, in some cases, to participate in the gathering of Jewish residents into the ghettos and in the mass killings. Sometimes the term is used in the German reports to refer to groups resisting German occupation authorities. The reports quoted in this opinion usually use the term in the former sense.

Appendix C

most heavily under the rule of Bolshevism and Judaism during the period of integration into the USSR, it could be expected that after their liberation of this foreign domination they would eliminate the enemies who were remaining in the country after the retreat of the Red Army. It was the duty of the Security Police to initiate these self-purging efforts and to guide them into the proper channels, so that the goal set for cleaning the area is reached as quickly as possible. It was no less important to establish for the future the firm and demonstrable fact that the liberated population on their own accord had taken the harshest measures against the Bolshevik and Jewish enemy, without any direction from German agencies.

In Lithuania this was accomplished for the first time in Kaunas by using partisans. Surprisingly, at first, it was not easy to initiate a large-scale Jewish pogrom there. The leader of the previously mentioned partisan group, KLIMATIS, who was primarily used here, succeeded in initiating a pogrom as a result of the advice given to him by a small advance detachment deployed in Kaunas, without any visible indication to the outside world of a German order or of any German suggestion. During the course of the first pogrom on the night of 25 June to 26 June more than 1,500 Jews were eliminated by the Lithuanian partisans; several synagogues were burned or otherwise destroyed and a Jewish residential quarter with approximately 60 houses was also burned down. During the following nights, 2,300

Appendix C

Jews were eliminated in the same manner. In other parts of Lithuania similar actions took place according to the example set in Kaunas, although on a smaller scale, extending as well to those Communists who had stayed behind.

By means of instruction given by the *Wehrmacht* agencies, which understood such activity thoroughly, the self-purging actions progressed without any problems. At the same time it was clear from the beginning that only the first few days of the occupation would provide the opportunity for carrying out pogroms. After the disarming of the partisans the self-purging activities, of necessity, had to cease.

For police protection in the Baltic states the regular police were to be supplemented by auxiliary police who were to be recruited from reliable members of recognized nationalist organizations friendly to Germany and members of former Baltic armies who had not participated in combat against the German *Wehrmacht*. These auxiliary police were to be selected and used locally and were to assist in the purely police functions of preserving public order in the local area. They were to be identified by armbands and were not to wear uniforms. "For the cleansing of larger rural districts (*i.e.*, killing all Jews in those districts), the auxiliary police may be used only with the advice and consent of a *Wehrmacht* command post or office." (Exh. G17).

After the brief period when *Einsatzgruppen A* urged Lithuanian groups to slaughter Jewish inhabitants and communist sympathizers, *Einsatzgruppen A* turned to its next task, the seizure and execution of the Soviet and Lithuanian leaders of the nation

Appendix C

under Soviet occupation. This too is described in the Stahlecker Report:

In addition to the search actions, a systematic search for remaining Communist functionaries, Red Army personnel and those persons tainted by their work for Communism was undertaken. In some cases the Self-Protective Forces had already spontaneously taken care of the most notorious Communists.

Large-scale actions were undertaken in the larger cities by all available personnel of the *Kommandos* and all the Self-Protective Forces, as well as with the support of the German *Ordnungspolizei*, during the course of which numerous arrests and searches were conducted.

After these priority tasks had been completed in the cities, the mopping-up operation was undertaken in the countryside by small *Teilkommandos* [partial detachments]. In this task, too, the Self-Protective Forces provided valuable help. On occasion rural Self-Protective Squads transported Communists caught in their area 150 km to deliver them to the *Einsatzkommandos*.

The daily situation report of August 16, 1941 (Exh. G9) summarized the results of the "Execution Activities" or "special operations" of Einsatzkommando 3 during the period from July 22 to August 3, 1941. A total of 1,592 persons were killed in ten different localities. One of these was Kedainiai where on July 23, 1941 "125 persons (83 Communist Jews, 12 Communist Jewish

women, 14 Russian and 15 Lithuanian Communist functionaries, 1 Political Agent) were liquidated."

While the political prisoners were being captured and exterminated Einsatzgruppen A and Einsatzkommando 3 took steps preparatory to the destruction of all of Lithuania's remaining Jewish population since "[f]rom the very beginning it was to be expected that pogroms alone would not solve the Jewish problem in the Ostland." (Exh. G19T at 23). During the pogroms instigated during the early stage of the German invasion, according to the Stahlecker Report, 3,800 Jews had been killed in Kaunas and 1,200 had been killed in Lithuania's smaller cities.

It was first necessary to gather all the Jewish residents in each locality in a central place from which they could then be taken in large groups to be killed. The process of assembling these residents is described in a number of the daily situation reports and summarized in the Stahlecker Report. According to the latter document:

Apart from the organization and implementation of executions, the process of creating ghettos in the large cities was already started during the first few days of operation. This was particularly urgent in Kaunas, since 30,000 Jews lived there among a total population of 152,400. For this reason, after the completion of the first pogroms a Jewish Committee was summoned and informed that the German offices had no reason until now to intervene in the differences between Lithuanians and Jews. A prerequisite for the creation of normal relationships for the time being would be the construction of

Appendix C

a Jewish ghetto. When the Jewish Committees raised objections, they were told that there was no other possibility of preventing further pogroms. Forthwith, the Jews immediately declared themselves ready to do everything to re-settle their fellow-Jews with the utmost speed to that part of the City, called Viliampol, designated as a Jewish ghetto. This part of the city is located in the triangle created by the Niemen on one side and a tributary on the other and is connected to Kaunas by only one bridge and is therefore easy to block off.

. . . .

Similarly, in the other cities, where a large number of Jews reside, ghettos are being established. The identification of Jews by means of a yellow Star of David on the chest and on the back which had been initially ordered by provisional Security Police mandates has been quickly implemented as a result of corresponding orders by the Commander of the Army Rear Area and later by the Civil Administration.

After the Jewish population had been confined in ghettos, the systematic killings began. The methods used and the results achieved are described in the December 10, 1941 report to Stahlecker from SS Colonel Jager, commandant of Einsatzkommando 3. (Exh. G14A, 14B). He described the procedures as follows:

The goal to make Lithuania "Jew free" could only be attained through the formation of a mobile

Appendix C

detachment with specially selected men under the leadership of SS Obersturmfuhror Hamann who shared my goals completely and who would guarantee the cooperation of the Lithuanian partisans and the existing civil offices.

The carrying-out of such actions is, in the first place, a question of organization. The decision to systematically make each district free of Jews necessitated a thorough preparation of each individual action and knowledge of the existing conditions in the districts in question. The Jews had to be collected in one or in several locations. Based on the numbers [of Jews] a place for the necessary pits had to be found and dug up. The route of the march from the collection point to the pits averaged 4 to 5 km. The Jews were transported to the execution site in groups of 500 and in intervals of at least 2 km. What difficulties and nerve-racking work that had to be accomplished is shown in the following random example:

In Rokiskis, 3,208 people were to be transported 4½ km before they could be liquidated. In order to accomplish this work in 24 hours, 60 of the 80 available Lithuanian partisans had to be detailed for transport duty and perimeter security. The remainder, who had to be repeatedly relieved, carried out the work with my men. Trucks were seldom available for transport. Attempts to escape that happened here and there were prevented

Appendix C

entirely by my men and with some danger to their lives. For example, 3 men of the detachment shot down 38 escaping Jews and Communist officials on a forest path near Mariampole. Not one escaped. The marching to and from [the execution site] for the individual actions amounted to ca. 160-200 km. Only through skillful use of time was it possible to carry out up to 5 actions in a week's time and to handle the work that had accumulated in Kaunas so that no bottlenecks occurred in the official functions.

The actions in Kaunas itself, where there were sufficient reasonably well-trained partisans available, were virtually duck shoots compared with the enormous difficulties which were often encountered elsewhere.

Jager's report sets forth chronologically and in meticulous detail the dates when each killing took place, the location of the killing and the precise number of men, women and children killed at each place on each date. There are 20 entries for August, 35 entries for September, 11 entries for October, and 10 entries for November, each entry recording the killing of anywhere from 6 to 9,200 persons.⁴ In all 133,346 men, women and children are

4. In addition to the Jewish dead, there were others, e.g., "5 communist functionaries", "1 Lithuanian woman", "19 Russian communists", "2 murderers", "2 Lithuanian NKVD agents", "1 mayor of Jonava who gave the orders to burn the city of Jonava", "1 Lithuanian who stripped the bodies of German soldiers", "432 Russians", 56 Lithuanians (all active communists)", "3 gypsies, 1 gypsy woman, 1 gypsy child", "mentally ill: 269 men, 227 women, (Cont'd)

Appendix C

reported to have been killed as a result of Einsatzkommando 3's activities during this period, plus 4,000 killed through pogroms and liquidations while Einsatzkommando 1b was responsible for the operation.

The City of Kedainiai is listed twice in the Jager report. The first entry reflects the July 23 execution of 125 persons accused of being high level communists and of working with the Soviet occupation authorities. The second entry is for August 28, 1941 which records the killing of "710 Jews, 767 Jewesses, 599 Jewish children—2,076."

On December 10, wrote Jager, "I can state today that the goal to solve the Jewish problem for Lithuania has been attained by EK 3. There are no more Jews in Lithuania except for those working Jews and their families" — those required in order for the economy to survive: 4,500 in Siauliai, 15,000 in Kaunas, 15,000 in Vilnius. Of Lithuania's 1923 population of approximately 150,000 Jews, only 34,500 remained.

December 10, 1941, the date of Jager's report, was three days after Pearl Harbor, the extension of the War to the Pacific and the commitment of United States armed forces into the conflict in Africa and Europe.

(Cont'd)

48 children", "4 Russian POW's", "1 German citizen who married a Jew", "1 Reichs-German who had converted to the Jewish belief and had visited a rabbinical school", and "15 terrorists of the Kalinin Group". Two poignant entries recorded the killing in Kaunas on November 25 and November 29 of "175 Jewish children (resettled from Berlin, Munich and Frankfurt am Main)" and "152 Jewish children (resettled from Vienna and Breslau)".

Appendix C

Perhaps coincidentally, in the following month the German reports first reflected signs of organized Lithuanian resistance to German occupation. The January 14, 1942 consolidated daily situation report (Exh. G15) stated:

11) *Reports of the Einsatzgruppen and
Einsatzkommandos Einsatzgruppen A:*

Location: Krasnogvardeysk

While up to now anti-German propaganda was spread mainly through word of mouth, spreading of rumors, and whispering campaigns, now, for the first time, pamphlets, printed in the Lithuanian language were found in some places in Kaunas with the following contents.

"Appeal to the Inhabitants:

The Germans are fighting for the freedom of nations, they are dying for the rights of the new Europe. We Lithuanians have already fully experienced what this promised freedom means. The German crusaders have betrayed the Lithuanian people. Have we fought for such freedom in the first days of the war and our brothers and partisans have shed their blood? Is that the freedom we possess today? The Lithuanian today is a slave without rights. The Lithuanians have already comprehended this. You partisans, wake up and go forward along with the entire Lithuanian nation.

Appendix C

The Germans began to murder the Jewish citizens by your hand. They have robbed the Jews' possessions. Know for sure partisans, you will end up the same way. You are the tool of the German Crusaders in the murder of innocent Lithuanian citizens. For once we all must all say the following: "It is enough to shed streams of innocent human blood. Today we must announce that we will fight all for one and one for all against the crusaders.

Partisans, choose one of two ways. Stop with the murder of defenseless people or you will fall at the hands of your brothers. We know for sure that the Germans wish the same fate as the Jews on all other ethnic groups. We will not allow that the Lithuanian people are liquidated by your hand, you will be liquidated by your brother. Today we will have the power to fight and win. Know that our eye observes you everywhere, even among your friends.

Death to the Crusader.

Judging from the entire manner of expression, this pamphlet is not likely to be of Communist origin, but rather the author is to be found mainly in the ranks of the activists or even among the ranks of the nationalists.

The evidence in this case does not purport to describe the extent of organized Lithuanian resistance to the German forces. However, there is evidence concerning elements of the resistance movement which is pertinent here.

Appendix C

Unlike the prospects faced by the resistance movements in the western nations conquered by Nazi Germany, in Lithuania the defeat of Germany did not ensure return to independence. Rather it was quite likely that Germany's defeat would simply result in the reinstatement of Soviet tyranny and religious oppression. Nevertheless, a resistance movement arose which opposed both the German occupation and renewed Soviet rule. This took place during the period from 1941 through mid-1944. During the early part of that period the Germans were enjoying staggering military successes in the Soviet Union, conquering vast territories and inflicting huge losses upon both military personnel and civilians. During the latter part of the period the Soviet Union inflicted similar losses and defeats upon the German armies driving them back towards Poland and the Baltic states. At the same time the western forces mounted offensives in Africa, Sicily and Italy and prepared for the cross-Channel invasion of France. During all that time the Nazis pursued their goal of killing the remaining Jews of eastern Europe and the Jews of western Europe, establishing the death camps in Poland and Germany.

The evidence in this case describes two kinds of Lithuanian resistance efforts.

One was the ambiguous conduct of the leaders of the Lithuanian Local Forces established in 1944 with the agreement of the Nazis occupation forces (Exh. D16). Its role was to fight communist partisans in Lithuania who worked with the Soviet forces advancing from the east. The German SS sought to mobilize this local defense force to fight with the Germans on the eastern front. This the leadership of the Local Forces resisted. Because of this show of independence and the failure of German mobilization attempts, in May 1944 SS Police General Jeckeln called a meeting in Kaunas to which the Local Forces commandant

Appendix C

General Plechavicius and chief of staff Colonel Urbonas were invited. Upon arrival they were arrested. In addition 28 other officers were arrested, deported and imprisoned. According to the Lithuanian Encyclopedia extract in evidence (Exh. D16) 3500 of the 10,000 Local Forces members were transported to Germany for forced labor or service in antiaircraft units. Other members of the Local Forces escaped, fleeing into forest areas with their leaders and weapons.

Of more direct pertinence in the present case are the resistance efforts described by Vydaudas Vidiekunas, a 79 year old man whose testimony I found to be convincing and totally credible.

When the Soviet Union invaded Lithuania in June 1940 pursuant to the secret protocols accompanying the September 1939 Boundary and Friendship Treaty, Vidiekunas was a lawyer in Kaunas and a leader of the Lithuanian Christian movement. In July of 1940 Soviet arrests commenced, and on July 11 and 12 a first wave of 1200 Lithuanian "intellectuals" was seized. Vidiekunas was on the list but was not captured because he was not at his office when he was to have been taken into custody. He fled to Germany, returning to Kaunas illegally in June 1942 to find that during the Soviet occupation his family had been deported to Siberia.

Upon his return to Kaunas Vidiekunas became a member of the Lithuanian Front, a resistance group which had started during the Soviet occupation and continued during the German occupation. Ultimately Vidiekunas became a member of the Supreme Committee for the Liberation of Lithuania.

The Lithuanian Front edited an underground newspaper. One of its primary activities through its paper and otherwise was to

Appendix C

urge young people not to respond to mobilization orders issued by SS General Jeckeln, head of the police for the Baltic states. These orders were repeated throughout the 1941-1944 period. Members of the underground worked in German controlled industries, in local government offices and in the local Lithuanian police forces. Through these sources the underground was able to procure documents enabling young persons to falsify their records and thus evade German mobilization.

This branch of the resistance movement was wiped out in the spring of 1944. A member of the Supreme Committee was arrested in Estonia, en route to Sweden. Under torture he disclosed the identities of the members of the Committee. The evidence leaves some question as to the exact date when the Germans began arresting members of the Committee and other members of the resistance. It may have been as early as mid-April; it may have been as late as April 29 or 30, 1944. Two members were arrested at that time. Vidiekunas was arrested on May 4 or 5. The arrests continued until June 1944, by which time the entire Supreme Committee for the Liberation of Lithuania was in German custody. This coincided with the June 6 Normandy landings of the American, British and Canadian armies.

At first the members of the Committee along with other members of the resistance were held in solitary confinement in Kaunas. There were 28 or 29 persons being held, of whom six were members of the Supreme Committee. In January 1945 all were taken to the Instenburg Prison in East Prussia for trial in Berlin on charges of treason. They were no longer in solitary confinement and could meet and talk with each other during yard recreation periods. During their daily periods in the yard Vidiekunas came to know a fellow prisoner, Broius Budginas, a person having significance in the present case. Budginas had

Appendix C

worked in a resistance organization known as the Freedom Fighters, which had acted separately from Vidiekunas' Lithuanian Front. Budginas had operated a clandestine radio in communications with Stockholm. He had been arrested by the Germans in April 1944, before Vidiekunas had been arrested.

The chairman of the court before which the prisoners were to be tried was killed in a February 3, 1945 bombing raid and the trial was postponed. Thereafter the entire group, including both Vidiekunas and Budginas was transferred to a prison in Bavaria. In the summer of 1944 the western allies had advanced from Normandy and the south of France to the German frontier; in December and January they turned back the German Ardennes offensive; by February, when the Lithuanian prisoners were moved to Bavaria, they were preparing for an advance to the Rhine and beyond. On April 14, 1945 units of the American Army liberated the Lithuanians from their prison in Bavaria.

On April 25 units of the American and Soviet Armies met at the Elbe River. The partition of Germany and Berlin into the Soviet, American, British and French zones was effected. Poland and the Baltic states were occupied by Soviet troops. Although a truncated Poland allied with the Soviet Union emerged from the War, the Soviet Union proceeded to incorporate into itself Lithuania and the other Baltic states.

The foregoing is designed to summarize events which must be taken into account if the more detailed evidence in this case is to be understood.

*Appendix C**II. The Killings in Kedainiai*

Kedainiai District in Lithuania (called Kauen-Land by the occupying Germans) had a population of 85,000 in 1923 which had increased to 102,000 in the mid 1930's. The Town of Kedainiai had a population of 8,500 in 1923 which most likely had increased somewhat by the time of the initial Russian occupation in 1940. The Jewish population of the Town of Kedainiai was 2,500 in 1923, which remained relatively stable through the 1930's.

Kedainiai is located 25 miles north of Kaunas, which had been Lithuania's capital. Kaunas was captured within a few days after the June 22, 1941 German attack on the Soviet Union and Kedainiai was occupied shortly afterwards.

Kaunas, which was the scene of the most violent of the pogroms instigated by the Germans against the Jewish population in the early days of the invasion, became the German administrative seat in Lithuania.

There is no evidence in this case that local people in Kedainiai engaged in any killings during the first phase of the Nazis annihilation program.

The German records reflect implementation of the second and third phases of the program in Kedainiai with the entries that on July 23, 1941 "125 persons . . . were liquidated" in Kedainiai and that on August 28, 1941 2,076 Jews were killed there. Apart from the overall role of Einsatzgruppen A and Einsatzkommando 3, the reports provide no details concerning these two events.

The government has offered, and I provisionally received in evidence the depositions taken in Lithuania of defendant's sister-

Appendix C

in-law and of five persons who testified that they were present at one or both of these killings. Defendant has objected to admitting these depositions in evidence for a number of reasons, which I will deal with below. However, having seen and heard the videotapes of the depositions, I conclude that they are sufficiently reliable to establish that the five witnesses were present on July 23, 1941 and/or August 28, 1941 and that their testimony provides a general mosaic of the events of those two days.

A. *July 23, 1941*: In the very early days of the German occupation the German authorities in Kedainiai encouraged the organization of groups of local persons who had had military experience or had been members of organizations such as the Riflemen (sometimes referred to as the Siauliai) which gave military training to its members. These groups were used to supplement the regular police force. Members continued in their regular employment but at night guarded bridges and patrolled the streets of Kedainiai. They wore white arm bands for identification.

In July, pursuant to the established program of the Reich Security Main Office, Lithuanians in Kedainiai District who had held leadership positions in the government under Soviet rule or who were leaders in the communist party were arrested. They were imprisoned in a barracks on Gediminas Street.

On July 23, 1941 the Kedainiai police authorities ordered two truck drivers to present themselves at the barracks on Gediminas Street in the morning. Armed members of the organized civilian groups or detachments and German soldiers had assembled there. The arrested men and women were taken from their cells and loaded on the trucks. Guards stood in the four corners of the back of each truck and the prisoners sat on the floor. They were driven to Babeniai Forest (also called Babences in the deposition testimony).

Appendix C

Meanwhile the members of the civilian groups were given rifles and were directed to walk to Babeniai Forest. There they were assigned responsibility for guarding the site, preventing people from entering or leaving.

The two trucks proceeded back and forth between Gediminas Street and the Forest, bringing successive loads of prisoners. When a truck arrived at the Forest the prisoners were ordered off the truck and directed by German soldiers and civilians wearing white arm bands into the Forest to a place where a large pit had been dug. There approximately 20 German soldiers forced the prisoners into the pit and shot them.

B. *August 28, 1941:* When the Germans occupied Kedainiai they imposed restrictions on the Jewish inhabitants. They were required to wear Stars of David and were not permitted to walk on the sidewalks — only in the streets.

Shortly all Jewish residents of Kedainiai were moved into a small ghetto area and were confined behind barbed wire. Regular police patrolled the perimeter of the ghetto in the daytime. Members of the civilian detachments participated in guarding the perimeter at night.

After the entire Jewish population had been assembled in the ghetto they were marched, men, women and children, to a former horse breeding farm on the outskirts of Kedainiai known as Zirginas.

On the day before August 28, 1941 a number of steps were taken in final preparation for the execution of the persons confined at Zirginas. To provide necessary transport the Kedainiai police chief (Kirkutis) ordered three truck drivers to report to the police

Appendix C

station on the morning of August 28 — Vladislovas Silvestravicius (a worker in the beer bottling plant in Kedainiai), Juozas Devidonis (a driver at Kedainiai's motor transport organization) and a person now dead whose last name was Mykolas. The civilian auxiliary police detachments and organized groups of workers, such as employees of the railroad, were also ordered to appear the same morning. Thus on the morning of August 28 there gathered at the yard near the police station the drivers, members of the civilian detachments wearing white arm bands, other groups of workers, the regular police and German soldiers. Some of the civilians, together with lime, beer and vodka, were loaded in trucks and taken to a spot on the Dotnuva Road not far from Zirginas where the Jewish inhabitants were being held. Other civilians were provided with rifles and taken to the place on foot.

This place was near the Smilga River, a small stream. A huge pit perhaps 100 meters long, three meters deep and four meters wide had been dug. Those who marched to the site were stationed in groups in a perimeter 50 or 60 meters from the ditch to keep persons from entering the area or from escaping. The Germans had mounted machine guns and informed the persons assigned to guard duty that they would be shot if they attempted to leave.

Those assembled at the place awaited the arrival of a special group of German soldiers — probably a detachment from Einsatzkommando 3. When these soldiers arrived the doors of the barn at Zirginas were opened and a first group of perhaps 200 was brought out. There is some confusion as to the order in which the groups were brought from the barn, but it appears that first the old men too weak to walk were loaded onto the trucks and transported to the ditch. German soldiers and civilians saw to the loading of the trucks.

Appendix C

At the ditch the old persons were taken off the trucks, ordered to proceed to the pit area where they were instructed to undress, placing their clothes in piles. From there they were shoved to the pit itself and forced into it. They were then shot by German soldiers using automatic weapons. The evidence is in dispute whether Lithuanians participated in the shooting.

As each group was shot Russian prisoners of war covered the bodies with earth and lime.

At Zirginas a tractor motor was kept running to drown out the sounds of the firing and of the screams of the victims. After the groups of infirm persons had been taken to the pit in trucks the remaining Jewish prisoners were brought on foot from the barn to the pit also in groups of approximately 200. German soldiers and Lithuanians directed the line of march. From midday until well into the evening groups of men, groups of women, groups of women with their children were escorted to the pit area, ordered to disrobe and forced into the pit to be shot and covered with earth and lime. Later their clothes and other possessions were sold in a special store which could be patronized only by Germans and perhaps by members of the detachments of Lithuanians.

Thus the December 10, 1941 Jager report's entry for August 28 was able to recite the killing of "710 Jews, 767 Jewesses, 599 Jewish children -- 2,076."

5. There was one incident which is described in a number of the depositions of eyewitnesses to the killings. One of the prisoners, Slapoberskis, a strong man, attacked a Lithuanian participant named Czygas, dragged him into the ditch, grabbed his pistol and choked him. This episode, which bears on the reliability of the deposition testimony, is described in meticulous detail by Vladislovas

(Cont'd)

*Appendix C**III. Admissibility of Deposition Testimony Against Defendant*

It is the government's contention that defendant was the leader of one of the civilian detachments organized when the

(Cont'd)

Silvestravicius, an employee at the Kedainiai beer bottling plant who was one of the three truck drivers ordered to transport the infirm prisoners from Zirgina: to the execution site:

Q Did any of the Jews fight at the ditch or try to escape?

A Only that only Jew I was mentioning earlier, Slapoberskis, who strangled Czygas.

Q Did you see Slapoberskis fighting with Czygas?

A Yes, I saw it.

Q Tell us what you saw?

A Someone undressed, and he had eyeglasses. They were neatly dressed and not — it was happening not far from my truck. And that Jew started telling Czygas that, "I am the same person like you." And Czygas caught him partially by his clothes, and this way the Jew was unstripped.

And then Czygas took out the pistol, which was noticed by Slapoberskis, and this Jew was a heavily built person. And then he grabbed Czygas by the collar and dragged together with him — and dragged him together into the ditch.

And in the ditch Slapoberskis was holding Czygas with one hand, by his neck, and with the other hand he was — and with the other hand he fired the pistol at the German.

The German was a commandant. But he missed him. Then he — then the German jumped into the ditch and managed to free Czygas, but the German himself was grabbed by Slapoberskis. Then Jankunas, the person I mentioned earlier, he was also a very heavily built person. At the same time Slapoberskis was struck — striking the German on his

(Cont'd)

Appendix C

Germans occupied Kedainiai, that under his leadership his detachment actively and willingly participated in the killing of the communist political and party leaders, that under his leadership the detachment participated in gathering the district's Jewish population into the ghetto area, bringing them to Zirginas and slaughtering them in the pit beside the Smilga River, and that defendant then acquired for himself possessions of the victims.

A. The Deposition Testimony: The government's charges find strong support in three of the depositions taken in Lithuania. The other three Lithuanian depositions either contain testimony which neither inculcates nor exculpates defendant or else tends to exculpate him. A deposition taken in the United States supports defendant's contentions. (Exh. S-3, dep. of Kostas Januska). Perhaps the most critical issue in this case is whether the Lithuanian depositions are admissible against defendant. A summary of the Lithuanian deposition testimony insofar as it relates to defendant is as follows:

(Cont'd)

head with the pistol, and at the same time Jankunas jumped into the ditch.

Q Did Slapoberskis survive or was he killed?

A And then when Jankunas jumped into — no.

And when Jankunas jumped into the ditch he freed the German away, whereas he himself was grabbed by Slapoberskis. And Jankunas had a knife with him, near — in his belt, and then he killed Slapoberskis with that knife.

Q Did Czygas survive?

A No. He died on the way to the hospital.

Silvestravicius Dep. at pp. 55-56.

Appendix C

In July and August 1941 Stasys Narusevicius was a railroad employee in Kedainiai. He testified that he and his co-workers were ordered to go to the police station at 8:00 a.m. on August 28. He was among the group taken on foot to the execution site and then directed to stand guard at the perimeter, allowing no one to enter or to leave. He was unable to recognize a photograph of defendant taken during the war period, and he testified that he had never heard defendant's name until it was mentioned during the deposition.

In the summer of 1941 Juozas Devidonis worked as a driver at the Kedainiai motor transport organization. He testified that pursuant to an order of the town's chief of police he drove one of the trucks which transported Lithuanian communist officials and communist party leaders from the barracks on Gediminas Street to Babeniai Forest where they were executed. He recognized none of the Lithuanians who participated in the event. He also testified that on August 28 he was ordered to drive one of the trucks which had been procured to transport Jewish prisoners from Zirginas to the pit. However, he stopped off at a friend's house to drink vodka before arriving at Zirginas and apparently was asleep in his truck cab during most of that day. When shown defendant's wartime photograph he testified that it was a person he may have seen somewhere—perhaps in Kaunas in the 1950's. In answer to a question by the Procurator who presided at the deposition he testified that he was not familiar with defendant, that he knows nothing about his activities and never gave evidence about him.

Juzes Rudzeviciene is defendant's sister-in-law. Her parents had resided at No. 3 Radvilu Street in Kedainiai since 1928 or 1929 with their three sons and two daughters. Well before the summer of 1941 the five children had left home and the parents

Appendix C

let out two of their four rooms to boarders. At the time of the German invasion defendant, who worked in the local bank, was one of the boarders and Jonas Dailide, who was an instructor at the trade school, was the other. Juzes Rudzeviciene and her sister Zofija, whom defendant later married, were students living in Kaunas. They visited their parents in Kedainiai from time to time during the summer of 1941 but were not present during the killings in July and August. Therefore Juzes Rudzeviciene was not in a position to testify about those events.

Born in 1910, Vladislovas Silvestravicius worked as a driver in the beer bottling plant in Kedainiai in 1941. He testified that on August 28 his superiors ordered him to fill his truck with gas and report to the police station where his truck was loaded with lime, vodka and beer. The cargo was unloaded at the pit and he then brought the truck to Zirginas where it was used to transport old people to the ditch. He testified as follows concerning people he recognized:

Q Did you recognize any of the men who took part in the shooting?

A I didn't know them. Later on I came to know a person named Gylys. Jankunas as well. That Gylys was a very handsome man. He worked as an engineer with electric equipment.

Q Was Gylys a leader or an assistant leader of the Lithuanian armed men?

A Maybe he was. He was an educated person, and I saw while shooting. I didn't know him at that time, but he was a handsome man. And later

Appendix C

on I noticed that he was working at the electric power plant as an engineer, and I thought at that time that such a handsome man was doing such work.

He was put on trial, and he was sentenced, and I took part in his case as a witness.

Q When you knew Mr. Gylys in 1941, was he in charge of a detachment of armed Lithuanian civilians?

A I didn't know him, and it was hard to notice. But it's clear he was the head.

Q And do you know if Mr. Gylys as a leader of the Lithuanian—or as an assistant leader of the Lithuanian armed detachments, had a superior?

A It's hard to tell.

• • •

Q Earlier you described an armed man who rode in the truck with you from the courtyard to the ditch. Would you describe that man?

A With me sat only one person. The rest were staying in the body of the truck. It was an elderly person, but it was not Kungys who was mentioned previously, because Kungys was a person of a medium height with a round face.

Appendix C

If you would show me a photograph of Kungys as a young person, I would recognize him.

Q When did you first meet Kungys?

A It was only at that time that I saw him. Later on I didn't see him.

Q Well, do you know where Kungys worked?

A No, I don't know.

Q Do you know where Kungys lived?

A No, I don't know.

Q So, in other words, Kungys was not a personal friend of yours?

A No.

• • •

Q Mr. Silvestravicius, please open the folder and look at the pictures.

A A person in this photo resembles Kungys.

Q You are pointing—would you point to the photograph you mean, sir?

It's Photograph No. 3?

Appendix C

A Yes, Photograph No. 3.

Q And who is this person? Please look at it. Who is that person—or who do you think that person is?

A It resembles Kungys, that head, that superior—to that superior who was giving orders in Kedainiai.

Q Do you know what his first name is?

A No, I don't know.

Q To whom was he giving orders?

A To all the rest he was—he was giving orders to all the rest.

Q Did he ever give you orders?

A No.

Q Would you please sign your name on the bottom portion of Photograph No. 3, which you have identified, and today's date?

A The person in the photo resembles Kungys, but hell knows whether it is Kungys or not. He resembles only. So how can I put my signature?

Q Well, I am simply asking you to put your signature to—as an indication that you have

Appendix C

identified that photograph of someone—as that of someone who looks like Kungys.

Whether or not you—I'm sorry, what did the witness say?

A So I can put that he resembles Kungys. So am I to write it here? ①

Q Yes.

Silvestravicius Dep. at 60-64.

This testimony was weakened considerably by his answers on cross-examination, and one is led to question whether his knowledge of defendant is based upon his own observations and recognition or upon what others told him.

Q How many people did you recognize at the ditch where the Jews were Shot?

A I recognized Jankunas and Gylys.

Q Besides Jankunas and Gylys, did you recognize any other person?

A No. Maybe they were from some other place. I don't know.

Q When did you for the very first time hear the name Kungys?

A I don't remember. Maybe after a week, maybe—maybe later on. I don't remember.

Appendix C

There were talks that he was in charge of everything, but I don't know.

Silvestravicius Dep. at 80-81.

Juozas Kriunas was born in Kedainiai in 1917 and lived there all his life except for 10 years' imprisonment by the Soviet authorities commencing in 1946. He was imprisoned for his role in the Kedainiai killings. In 1941 he was chief accountant at the Cooperative Dirva. A fellow employee was Kostas Januska. Kriunas testified that his work brought him to the bank where defendant worked and consequently he knew defendant.

Kriunas further testified that in the first days of the German occupation certain citizens of Kedainiai organized a detachment to assist the Germans and that the detachment had 25 members. He stated that he and Januska were members, that defendant was the leader of the detachment and that a man named Gylys was his assistant.

According to Kriunas he was not a member of the detachment at the time of the July killings at Babeniai Forest, but that defendant told him "that we shot the whole party—all party activists, and that's it" and that "[h]e was the leader of the shooting and was shooting himself." (Kriunas Dep. at 23, 24).

Kriunas also testified that defendant and his detachment and German soldiers took the Jewish people to the ghetto and later took them to the horse breeding farm at Zirginas. On August 28 the members of the detachment gathered at the police headquarters and were given rifles. Kriunas stated that at the place of assembly defendant had said simply, " 'Men, we are moving, we are going,' and that's it." (Kriunas Dep. at 40). They proceeded

Appendix C

to Žirginas, and Kriunas testified that his assignment was to drive the Jewish prisoners from Žirginas to the pit. Defendant was with them, according to Kriunas, and ordered that the doors of Žirginas be opened and the women be driven out. When the women and children were brought to the pit defendant and the German commander ordered them to undress. Kriunas testified, and after they were pushed into the pit detachment members, including defendant and Januska, and German soldiers shot the victims. As group after group was brought to the pit, defendant, according to Kriunas, ordered them to undress and with his pistol participated in shooting them.

Kriunas was unable to identify the wartime photograph of defendant.

Jonas Dailide, born in 1907, arrived in Kedainiai in 1946 when he became an instructor at the trade school. He, like defendant, was a boarder at No. 3 Radvilu Street. Although he had never served in the Lithuanian army he had been a member of the Siauliai, an organization comprised mostly of former army members. It had been disbanded during the Soviet occupation. He testified that when the Germans first occupied Kedainiai former members of the Siauliai were called to register and to serve as an auxiliary police force. An old reserve officer was their leader and their duties were to preserve order. According to Dailide, defendant "might have been the assistant to one of the heads of the detachment of all the unit" (Dailide Dep. at 34) and did not stand guard but checked on those who were on guard.

Dailide testified that the detachments did not assist the police in the arrest of communists, government leaders and party members but that on the day of their execution they stood guard

Appendix C

at the execution site. He further testified that on that day he saw defendant twice, once at the barracks on Gediminas Street before marching to Babeniai Forest and again in the cab of one of the trucks which brought prisoners from the barracks to the Forest.

Dailide was ordered by the principal of his school to report to the yard of the German commandant's office in the morning of August 28. Dailide testified that defendant was at the yard and was acting as head of one of the smaller detachments consisting of 20 to 30 people. This was not the detachment of which Dailide was a member.

Dailide then proceeded to give two utterly different accounts of defendant's actions at the execution site. One portrayed defendant as playing a relatively minor role; the other portrayed him as participating actively in killing the prisoners and seizing a part of their possessions for himself. The second version was given when the government sought to "refresh his recollection", using a protocol which Dailide signed in 1977 after interrogation by the Soviet authorities and which purports to set forth what he told them then.

Dailide's first version: Defendant's attachment, like the other detachments, formed a perimeter guard around the general area of the pit. As Dailide testified, ". . . only I would like to emphasize that we stood on guard not at the shooting place, but in the surrounding area." (Dailide Dep. pp. 59, 60). At the place where the shooting took place "[o]nly Germans were present." Defendant passed on instructions from the Germans to the various civilian detachments guarding the perimeter. Dailide testified that he did not see defendant "at the execution place" (Dailide Dep. at 60) and that he did not know if members of the detachments were allowed to select Jewish property or if defendant received any

Appendix C

such property. Asked if he saw defendant with a wardrobe and two suitcases filled with clothes at his home, he replied, "No, I haven't seen it. . . He didn't have much—he didn't have many things. He came with one suitcase and he left with one suitcase as well." (Dailide Dep. at 64).

Dailide's second version: After Dailide testified in the normal manner, the government read to him statements he supposedly gave to the Soviet authorities in 1977. Dailide then stated that he thought that "the evidence written in the protocol was a true evidence" and that the protocol refreshed his recollection of what happened. (Dailide Dep. at 75-85). Among the statements in the protocol which Dailide affirmed as being "true evidence" were the following:

During the entire shooting Juozas Kungys was walking back and forth with a pistol in his hand directing the shooting. I did not see him shooting since I did not watch all the time."

Dailide Dep. at 80; *see also* 83.

I was directed to stand guard about 40 meters from the ditch to prevent the Jews from running away. From this point I clearly saw the ditch where the Jews were shot. In this mass shooting of the Jews, civilians and Hitlerite uniformed soldiers participated, that is, soldiers and officers.

The civilians were the bourgeois nationalist gang members and their assistants, but where the Hitlerite soldiers came from or to what unit they belonged, I do not know.

Appendix C

Dailide Dep. at 81.

After the mass shooting of the Jewish nationals I saw a wardrobe and two suitcases filled with clothes that belonged to the Jews at Kungys' home. I do not know how he acquired them.

Dailide Dep. at 85.

Shown the wartime photograph of defendant, Dailide stated, "It resembles Kungys. . . . though he was not quite like that. . . . He resembles Kungys, but I can't confirm it, really. . . . I doubt." (Dailide Dep. at 91).

The Soviet authorities questioned Dailide about the July and August 1941 killings in 1946 and 1977. On each occasion he signed a protocol as to what he told the authorities. He was never charged with any crimes for his participation in those events.

As stated above, the testimony of Silvestravicius, Kriunas and Dailide, if believed, would be strong evidence of the truth of the government's charges that defendant was an active participant in the killing of the communist government and party leaders and the killing of the Jewish residents of the Kedainiai District. For the reasons set forth below, however, I have concluded that these depositions, insofar as they purport to inculcate defendant, are unreliable and were taken under such circumstances that their use against defendant would violate fundamental considerations of fairness. No single factor compels this conclusion, but the circumstances in their totality permit no other conclusion.

B. The Soviet Interests Involved and Methods Used: The prosecution of this case results from an unusual cooperative effort

Appendix C

Many thousands of Lithuanians fled the country as the Soviet army approached in 1944. No doubt a number of these refugees were persons who had collaborated with the Germans and some no doubt had participated in the killing of Lithuania's Jewish population. Many thousands were not guilty of such offenses and of that number at least some had engaged in resistance to the German regime. These thousands fled from a renewed Soviet tyranny and frequently to avoid possible execution or deportation.

Despite Soviet conquest there remain strong nationalistic feelings and continuing allegiance by a significant portion of the population to the Roman Catholic Church. The attempts by Soviet authorities to stamp out these influences and to create the myth of historic friendship between the people of the Soviet Union and its various national groups are weakened by the presence abroad of large groups of emigres who experienced personally the affects of Soviet occupation and who help keep alive Lithuanian national and religious convictions.

Three witnesses, whose testimony was submitted in deposition form or in the form of testimony from other trials, described the steps the Soviet Union has taken to counter the influence of emigres from the Baltic states. These witnesses were Imants Lesinskis, a Latvian member of the KGB who defected in 1978; Melbourne Hartman, who had specialized in refugees from the Baltic states when he served as an investigator for the United States Displaced Persons Commission in 1949-1950 and who later became an employee of the CIA; and Tonu Parming, an Estonian who graduated from Princeton, was a Fulbright Scholar, received a graduate degree from Yale and has specialized in population and nationality issues and Soviet studies with emphasis on the Baltic states.

Appendix C

Lesinskis, born in Latvia, studied at the Moscow Institute of International Relations and after working briefly in Latvia returned to Moscow for KGB training. The KGB (the State Security Committee) has a central headquarters in Moscow where it is attached to the Council of Ministers, and it has a similar headquarters in each of the federal republics, including Latvia, Lithuania and Estonia.

Lesinskis worked for the KGB from 1956 to 1978 when he defected. One of his early assignments was with "Motherland's Voice", an agency engaging in propaganda designed to discredit Latvian emigres abroad by characterizing them as war criminals or collaborators during the German occupation or by characterizing them as acting under orders of western intelligence agencies. Sometimes the charges were true; sometimes they were fabricated.

In 1964, there was formed the Latvian Committee for Cultural Relations of Latvians abroad, and during 1970-76 Lesinskis was chairman of its presidium, receiving instructions from the KGB. Its objective was also to discredit Latvian emigres, particularly those who actively sought the end of the Soviet occupation. This was accomplished by publication of books and articles purporting to describe the war crimes and collaboration of which emigres were guilty. The facts were often embellished and supplemented with forged documents, false testimony and pure invention. When he was assigned to a post in the United States, Lesinskis' job was to obtain information about Latvian communities abroad, to promote discord within them and to discredit their leaders. All of this was a KGB function.

Lesinskis testified that there was also a Committee for Cultural Relations of Lithuanians. He was not personally involved

Appendix C

of the Office of Special Investigations ("OSI") and Soviet authorities. The Soviet authorities have provided documents from archives under their control and, more important, they have assembled, interrogated and produced for deposition the witnesses whose testimony is critical if the government's principal charges are to be sustained. This cooperation was noted at the commencement of each deposition taken in Vilnius when the procurator informed the witness: "I act on the instructions of the Procurator General of the USSR in connection to render all the possible assistance to the USA Ministry of Justice, Office of Special Investigations." (E.g. Narusevicius Dep. at 4, 5).

The Soviet authorities are outside of the jurisdiction of the United States judicial system. Consequently it is impossible to provide the usual safeguards of the trustworthiness of the evidence having its source in the Soviet Union. This becomes a matter of grave concern for two reasons. First, the Soviet authorities have a strong motive to ensure that the government succeeds in this case. Second, the Soviet criminal and judicial system is structured to tailor evidence and produce results which will further the important political ends of the Soviet state at the expense, if need be, of justice in a particular case. Although these conclusions should come as no surprise, *see, e.g.,* Dershowitz, *The Best Defense*, Chapt. 7, "An American Lawyer in the Soviet Court System" (Random House 1982), the defendant's evidence in this case, uncontradicted by any evidence of the government, graphically illustrates how these characteristics of the Soviet Union are relevant to this case, bearing particularly on the admissibility of the Lithuanian depositions.

The Soviet Union's seizure and continued occupation of Lithuania has been accomplished by force, executions, deportation of Lithuanians and resettlement of non-Lithuanians in Lithuania.

Appendix C

in its activities but he knew it had the same objectives as its Latvian counterpart and was also a KGB agency.

Referring to trials of war criminals within the Soviet Union, Lesinskis stated that they were considered "political trials", and therefore reliance could not be placed on the formal safeguards written into Soviet law to protect a defendant.

The fact that the Soviet Union's particular interests are served when a United States court finds that an emigre participated in the slaughter of Jewish citizens or otherwise collaborated with the Germans, of course, does not preclude such a finding. However, the very strong interest of the Soviet state in such a finding requires that the role of Soviet authorities in achieving its desired end in this case be examined with particular care.

The Soviet system of justice is not such as to instill great confidence in the unverified fruits of an investigation of a case involving sensitive state issues. Two witnesses, whose testimony was also submitted in deposition form, or in the form of former trial testimony, described that system insofar as it is relevant in this case. Zigmas A. Butkus graduated from Vilnius Law School, worked for the procurator's office in Kaunas as an investigator for two years, was a district judge in Kaunas for three years, and eventually became chief of the Kaunas Bar. He never worked for the KGB. Frederick Neznansky worked as a lawyer in the Soviet Union for 25 years—15 years in the Procurator's Office of the USSR and 15 years as a member of the Moscow Bar.

Both witnesses, but particularly Neznansky, described how the Soviet legal system functions in practice. Paralleling the constitutional organs of justice is a body not mentioned in the

Appendix C

constitution which controls the activities of the KGB, the police, the procurators and the judges. That body is the Department of Administrative Organs of the Central Committee of the Communist Party. A corresponding body exists at each level of government. According to Neznansky, "outside of the common system of criminal law, the law of judicial procedure and other ordinary legislation, there is the Communist Party legislation in the Soviet Union whose decrees are communicated to the parties involved through a variety of means." (Neznansky Dep. at 470). Failure of a procurator or judge to follow party instructions would result in the loss of his job and party membership.

Neznansky and Butkus each testified concerning Soviet prosecution of persons charged with war crimes. The former, at least, has no reason to be sympathetic to those guilty of such charges. His grandparents were shot by the Germans in Russia in 1941; his uncle and eight of his children were buried alive in the grave they dug at the command of the Germans.

There came a time in the Soviet Union when a campaign against war criminals was given great emphasis. Appropriate instructions were issued to procurators and judges. This coincided with widely publicized claims that western nations were harboring such criminals and refusing to extradite them.

According to this testimony, there are three kinds of cases in the Soviet Union—(i) those involving common people, accounting for 70-80% of all cases, (ii) those involving members of the ruling circles and (iii) political cases. The latter involve inhabitants of ethnic republics seeking independence, religious persons, and political dissidents. Such cases are only nominally controlled by the codes of criminal procedure. They are subject to Party direction. They are investigated by the KGB and prosecuted by the appropriate procurator.

Appendix C

According to Neznansky's testimony, the testimony and other evidence in such cases is not necessarily false. Many witnesses are truthful and many investigations are conducted honestly. However, where the evidence does not support the desired results there is intense pressure to remold it:

So far as I know from my being able to peek into Soviet official records in the Ministry of Internal Affairs back in 1977, there were 10,000 people in jail for offenses which would be called political in the west. Those cases, the whole illegal arsenal of investigation and trial is being used by the authorities. The political cases are investigated mostly by the investigative arm of the KGB. Other cases are investigated by the procurator's office or the Ministry of Internal Affairs. Witnesses are indeed trained to testify according to the wishes of the prosecution. Sometimes they are threatened, not in a serious way, but people could be told that they will be fired if their testimony was not appropriate. Or sometimes if a witness is in line for a new apartment, they would take him off that line, or they would threaten to telephone his manager at work or his Communist Party organizer and make trouble for that witness.

Sometimes witnesses are threatened in a more serious way of being accused of perjury, threatened with being accused of complicity in the given crime. And evidence is also falsified on occasions.

For example, a witness would be asked, did you see this man there at a given time. And the

Appendix C

witness would say, no, I didn't. So he would be called to the interrogator again and again. He will be bothered sufficiently enough to change his testimony in the desirable way eventually. And the investigation continues even after the case was given to the court.

For example, when I was an investigator myself, a judge would call me sometimes and tell me, you sent us this witness and he changed his testimony in court. You told me one thing and he's telling us something else. We will recess the court for a couple of days. Could you work him over a little bit more. So call the witness back and make him change his testimony.

From the experience of my colleagues and people I knew in the KGB, sometimes they falsified the transcript of a witness' testimony. For example, a witness would testify to one thing and the transcript will say another thing, and then simply force the witness to sign this testimony, usually appealing to his sense of civic duty. The way it's explained to the witness is quite often very lofty. The accused is a criminal against the Communist Party, against the state, and is probably a parasite and an enemy of the people. So it is the civic duty of the witness to testify in the appropriate way.

Neznansky Dep. at 639-641.

Cases involving charges of war crimes were and are treated by Soviet authorities as political cases. This includes cases in which

Appendix C

the Soviet authorities assemble evidence for the use of OSI in denaturalization proceedings such as this. It can hardly be questioned that in the present case the KGB was responsible for preparing the Lithuanian witnesses for OSI interrogation by examining them and obtaining written statements (the "protocols"). The February 25, 1983 issue of *Izvestia* (Exh. D-52) reported that "The Committee for State Security of the USSR [KGB] paid great attention to the request from our editors to speak to them about that work, which is being carried on in searching out war criminals, individuals who during war time committed bloody crimes—About this was our conversations with responsible employees of the USSR's KGB. I was provided with the opportunity to acquaint myself with documents, have detailed talks with the employees, who from day to day, from year to year, engage in this work which is so hard, but so necessary for the good of humanity . . . The motto of those who search for former Nazis, traitors, persons who committed war crimes, is—the defense of the interests of our state and justice. These interests of the state dictate all of the in depth, tense and complicated work in the search for war criminals."

No defense evidence establishes that any document supplied by the Soviet Union in any denaturalization case was false or that any witness whose testimony was taken in the Soviet Union was subjected to improper pressure or other influences. But, of course, no defendant in any such case has had the opportunity to investigate the circumstances under which the KGB and procurator prepared the witnesses for interrogation by the OSI.

We are faced with a situation where the Soviet Union has a continuing, strong state interest in a finding that defendant was guilty of atrocious conduct while collaborating with German occupation forces. We also are faced with the fact that the Soviet

Appendix C

Union uses special procedures in political cases such as this which, on occasion at least, result in false or distorted evidence in order to achieve the result which the state interest requires. In these circumstances OSI received from the Soviet authorities the product of the KGB investigation primarily in the form of protocols containing the purported prior statements of witnesses.

With these factors in mind it is necessary to examine both the manner of conducting the depositions and the content of the testimony elicited in this case.

C. Conducting the Foreign Depositions: The foreign depositions were taken pursuant to an order of Judge Meanor dated October 14, 1981. The order provided that the depositions would "be governed by the Federal Rules of Civil Procedure and plaintiff shall not interfere directly or indirectly with the right of defense counsel to conduct a full and free cross-examination of each witness—no witness shall be instructed by the plaintiff not to answer any questions." The order also provided that the government "shall have present at each day of each deposition in Europe translators proficient in Lithuanian and Russian who are disinterested in the outcome of the law suit. . ."

Many aspects of the deposition procedures cast doubt upon the reliability of the testimony concerning defendant and give rise to concern that this testimony may have been affected by the Soviet Union's interest in this case and by undue pressures brought to bear upon the witnesses.

Presiding over each deposition was a Soviet procurator who exercised the authority of a judge and who directed the proceedings and limited areas of inquiry. If a truly impartial person were filling this role it would not be objectionable, but in effect one of the

Appendix C

parties to the proceeding was also acting as judge. The prosecution of the case is a joint OSI-Soviet endeavor. The fact that the Soviet authorities had completed their investigative phase of the case and had turned over the fruits of their work to the OSI does not transform them into neutral observers. They remained part of the prosecution team and in fairness the officer who presided at the depositions should not have been a part of that team.

Moreover, in the case of the government's two most critical witnesses—Jonas Dailide and Juozas Kriunas—the presiding procurator was Jurgis Bakucionis. Data concerning Bakucionis is set forth in *The Chronicle of the Catholic Church in Lithuania*, an underground, illegal publication appearing approximately six times a year. It documents Soviet violations of human rights, particularly those of a religious nature. A summary of the *Chronicle's* references to Bakucionis (Exh. D-32) shows him to be an aggressive prosecutor of persons charged with offenses involving the exercise of religious practices or evidencing loyalty to national Lithuanian interests.⁶

6. Three examples of the summaries of articles in the *Chronicle* prepared by Father Casimir Pugevicius, a Roman Catholic Priest, illustrate the nature of Bakucionis' role as procurator.

The case of five persons arrested during a crackdown against ethnographers in Lithuania and Latvia was brought to trial in Vilnius and prosecuted by Assistant Chief Prosecutor Bakucionis. Prosecutor Bakucionis accused Sarunas Zakauskas of instigating the ethnocentric organization and asked the court to pass the maximum sentence of seven years under Article 68 of the LSSR Criminal Code "anti-Soviet agitation and propaganda". *Chronicle* No. 10, Mar. 5, 1974, pp. 20, 23.

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Appendix C

Each deposition commenced with a warning by the Soviet procurator to the witness of his obligations under Soviet law. Each had previously signed a protocol after interrogation by Soviet investigators investigating this case (most likely representatives of the KGB). Then the procurator questioned the witness in broad general terms, such as "What do you know about the execution of the Soviet activists and the Jews in Kedainiai?" (Narusevicius Dep. at 9). This of course called for personal knowledge and knowledge based on all manner of reports and statements of others, with no means of distinguishing one form of knowledge from the other.

In the case of the critical witness Juozas Kriunas, who had spent ten years in a Soviet labor camp, it was not enough that Procurator Bakucionis presided. In addition, as one of the OSI interrogators announced to the witness and for the record, "Present at this deposition is Mr. Zhukov, from the Soviet Procurator General's Office." It was the first day of testimony

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Prosecutor Bakucionis represented the state in the trial of Viktoras Petkus, which began on July 10, 1978. Petkus was a member of the Lithuanian Group to Monitor the Helsinki Accords. Petkus was sentenced to three years in strict regime labor camp, and five years of internal exile, *Chronicle* No. 34, p. 6

Responding to a summons, Father Alfonsas Svarinskas, Pastor of the Catholic Church in Vidukle, reported on September 3, 19—to the Prosecutor's Office of the Lithuanian SSR in Vilnius, at Gogolio g. 4, office no. 55. He was met by Prosecutor Bakucionis who, calling the priest "an especially dangerous recidivist", had him don striped concentration camp clothing, and led him to another prosecutor for charges.

Appendix C

in Lithuania. Perhaps Zhukov was there as a courtesy to the OSI. Perhaps he was there to remind the hapless Kriunas of his obligations to the Soviet authorities.

Observing the deposition it was disturbing to note the extreme deference which the OSI attorneys paid to the Soviet procurator, who was in reality nothing more than their partner in the prosecution of the case. It was disturbing to note the manner in which representatives of the Department of Justice adopted the phraseology of the Soviet Procurator—for example, always referring to the government and Communist Party leaders shot at Babeniai as "Soviet activists." No doubt this was done unconsciously. However, this deference to the Soviet officials cannot have been lost on the witnesses and it emphasizes the unwarranted role assigned to a Soviet procurator in a case where the rights of a United States citizen are being tried in a court of the United States.

After the Soviet procurator opened each deposition with his questioning of the witness, an OSI attorney commenced his examination. The government's method of questioning the witnesses compounded the difficulties created by the procurator's sweeping generalized questions. The government attorneys persisted time and again to pose blatantly leading questions, drawing upon the protocols which the witnesses had signed and upon the answers which the witnesses had given to the procurator's questions. Before I concluded that the deposition testimony cannot be admitted for the purpose of implicating defendant in the Kedainiai killings, I attempted to separate the most clearly objectionable questions from less objectionable ones, but the entire proceeding was improperly affected by this form of questioning.

Despite the fact that Judge Meanor's October 14, 1981 order

Appendix C

required that defense counsel have the opportunity "to conduct a full and free cross-examination of each witness", and despite the fact that the government's attorneys were directed not to instruct any witness not to answer, the actions of the procurator seriously limited the effect of these requirements.

When defendant's attorney sought to cross-examine Devidonis about the Soviet investigation of his role in the 1941 events, the procurator instructed him, "Mr. Berzins, will you please give questions in the matter of the deposition?" (Devidonis Dep. at 67). Even the government attorney recognized that this constituted a totally unwarranted limitation of cross-examination and suggested that if the questions dealt with defendant's participation or if Devidonis was giving incriminatory testimony against himself, the inquiry should be permitted. The procurator then questioned the witness whether he knew anything about defendant (which he did not) and ascertained from the witness that he said nothing during his 1977 and 1966 investigations which were not truthful. This apparently was designed to show that there was no information of the nature which the government attorneys suggested might be the subject of cross-examination. However, even the government missed the point. A critical question was not only what Devidonis said about defendant in 1977 and 1967. A critical question was whether at those times he attributed to persons other than defendant responsibility for acts of which defendant is now charged.

Cross-examination of one of the government's two most important witnesses, Juozas Kriunas, was limited by the procurator. For example, after having established that Kriunas had signed a protocol in 1946 as well as in 1977 defense counsel pursued the matter of the protocols further, only to be met with an instruction from the procurator; "I would like to remind you

Appendix C

once more, Mr. Berzins, that we are investigating Kungys' case and not the biography of the witness and not the relations of Mr. Kriunas with the Soviet authorities." (Kriunas Dep. at 59). As the foregoing portions of this opinion should suggest, the relation of all the witnesses with the Soviet authorities is absolutely critical in determining the reliability and thus the admissibility, of the depositions taken in Lithuania. Here cross-examination on that subject was limited, if not foreclosed.

Also during the Kriunas cross-examination the procurator sought to cut off the witness' response. As defense counsel examined concerning the disposition of the clothing of the persons who had been shot, a subject well within the scope of the direct examination, the procurator stated to Kriunas, "I would ask the witness to give a short answer, and I would ask Mr. Berzins, in order not to waste time. . . ." (Kriunas Dep. at 81).

On occasion the OSI attorneys impeded defense counsel's efforts to obtain information about prior statements given by the witnesses, making silly objections, thus compounding the difficulties of defense counsel who confronted one opponent across the table and one at the head of the table. For example, after establishing that Silvestravicius had testified at the trial of a person named Gyls who had been charged with participation in the Kedainiai killings, defense counsel asked him at how many other trials he had testified. The government attorney broke in with an objection asserting that the question had not specified that it related to trials arising out of the Kedainiai killings. (Silvestravicius Dep. at 77). The objection was completely unwarranted as it was perfectly obvious that the Kedainiai killings were the only subject of all the questions.

Another factor which suggests the degree of Soviet

Appendix C

involvement in and orchestration of the depositions in the use of interpreters provided by Intourist, also an agency of the Soviet Union. The interpreters appeared to be highly qualified. There is no evidence of any complete misinterpretations. However, it is clear from the testimony of defendant's witness, Daiva Kezys, a Lithuanian interpreter, and from other evidence that translations were skewed to throw a favorable light upon Soviet procedures and to cast the most favorable light possible upon the witnesses' testimony implicating defendant. There were strategic omissions of testimony, obviously for the same reason. For example, when Narusevicius was shown a folder containing six photographs (one of them of defendant) and was asked if he could recognize anyone, his answer was translated as: "No, I can't recognize. They all look so different, No, I can't." (Narusevicius Dep. at 52). Omitted from the translation was the witness' answer: "You can chop my head off—I don't know." The omitted phraseology is significant both in itself and for the cross-examination it might have elicited.

It is unnecessary to recount the numerous shadings of meaning resulting from the apparent bias of the interpreters. Use of an Intourist employee was a violation at least of the spirit of Judge Meanor's order that the interpreter be a person "disinterested in the outcome of the lawsuit." It is always possible to retranslate the entire deposition testimony if necessary, but that would not assist defense counsel who had to cross-examine on the basis of the translations made on the scene. The subtle shadings of meaning and omissions during translation are simply further indicia of the interest of the Soviet authorities in the outcome of these proceedings and of the methods which may have been employed to influence the outcome.

Appendix C

D. Questions Raised by the Content of the Depositions: The preceding discussion suggests that the Soviet authorities had an interest in the outcome of this case and that the practices employed by the Soviet authorities in this case (to the extent it is possible to ascertain what they were) were consistent with practices known to be used in political cases. The preceding discussion also shows that at the depositions themselves cross-examination directed to prior statements of witnesses and their dealings with Soviet authorities was limited by the rulings of the procurator. This does not establish that the incriminating testimony necessarily was false, but it raises serious doubts.

There is within the deposition testimony itself some evidence of improper pressures having been applied to the witnesses. All had been interrogated by Soviet authorities in 1976 or 1977 and the interrogators wrote down in the form of a protocol what each witness purportedly told them. The protocols were furnished to the OSI and ultimately to defense counsel. The OSI attorneys used the protocols to "refresh the recollection" of witnesses whose testimony varied from the account given in the protocols.

The testimony of two witnesses suggests that the interrogators may have attributed to the witnesses statements which they had not made.

The procurator interrogated defendant's sister-in-law, Juzes Rudzeviciene, as to the date and place of defendant's birth. This was a significant question because defendant is charged with having falsely stated the date and place of his birth in his immigration and naturalization papers. In response to the procurator's questions Rudzeviciene replied, "I don't know. I don't know anything about his family." The procurator then pointed out to her: "Witness Rudzeviciene, on the 26th of February, in 1977,

Appendix C

you gave testimony to the Kedainiai Judge Janushkevicius, and then you testified that you know that Kungys was born in Shalialai District in 1915." Despite the efforts of the procurator to persuade Rudzeviciene that she must have known this fact in 1977, Rudzeviciene insisted she never knew defendant's date and place of birth. If that is true, as seems likely, the statement in the protocol was an invention of the interrogators.

More dramatic is the contrast between Dailide's original testimony during the government's direct examination and the statements he is purported to have made in his 1977 protocol. Significantly, perhaps, he does not recall whether he read the protocol.

In any event, as described above, the statements attributed to him in the protocol are far more damaging to defendant than his prior testimony. When confronted with the protocol his demeanor changed remarkably. He was reduced to acknowledging, in effect, that if a matter was stated in the protocol it must be true. One is left to speculate whether Dailide had forgotten what he told the Soviet investigators in 1977 or whether the Soviet investigators had written a protocol which departed markedly from what Dailide actually said. One is also left to speculate whether what is stated in the protocol is true, whether what Dailide first testified to is true or whether both the protocol and the original testimony are false insofar as it relates to defendant.

One thing can be said with certainty. Dailide never used the language attributed to him in the protocol. He testified at length during the deposition taken in this case and it is possible to ascertain his manner of speech. It is inconceivable that he would have used the words attributed to him such as "the bourgeois nationalist gang members" and the "Hitlerite soldiers". That

Appendix C

language was the invention of the Soviet interrogators. One can only speculate how much more of the protocol was the invention of the interrogators.

There are parts of the Dailide testimony given prior to the OSI attorney's reference to the 1977 protocol which raise questions as to its accuracy. Most of the observers of the killing of the Jewish prisoners described with considerable consistency the attack by Slapoberskis upon one of the guards and the German commandant at the edge of the pit. Dailide, on the other hand, describes an escape attempt of Slapoberskis at a considerable distance from the pit which is totally different from the other accounts of the Slapoberskis episode. (Dailide Dep. at 61). Also Dailide in his unrefreshed testimony stated that he and defendant were boarders at 3 Radvilu Street in the critical summer of 1941. On cross-examination he stated in seeming contradiction to the direct testimony that the boarders at that time were the owners, two of their daughters, the wife of a Red Army Officer and himself, with no reference to defendant. (Dailide Dep. at 107).

The accuracy or inaccuracy of the protocols is a critical issue. The various witnesses would have had to have had extraordinary courage to disavow any statement contained in a protocol. The depositions were presided over by a procurator, an officer of the legal system under whose auspices the protocols were prepared. To have disavowed the protocols would have constituted a serious criticism of the system itself. Each witness who gave testimony implicating defendant in the killings was unusually vulnerable to pressure from Soviet authorities. Dailide testified to his own participation with defendant in the events at Babeniai Forest and on the Smilga River. He had never been subjected to charges for this conduct, but the threat of prosecution remains. Kriunas had already served 10 years' imprisonment for his role in the killings.

Appendix C

When testifying he was confronted not only with the presence of the local procurator, but also with the presence of a representative of Moscow's Procurator General's Office. He clearly would not lightly risk a return to the Soviet penal system.

Like Dailide, Silvestravicius has never been tried for his role in the 1941 killings. Also like Dailide he has been a frequent witness in cases against others. He too is under pressure to conform to the wishes of Soviet authorities and must recognize that prosecution for his role in the Kedainiai killings is always possible.

E. The Missing Evidence: None of the foregoing established conclusively that Soviet authorities did in fact unduly influence the testimony of the deposition witnesses in this case. It does establish that there is a very grave risk that they may have done so and that there has been a totally inadequate opportunity to investigate this question.

There was documentary material in existence which most likely would have been of substantial assistance in determining whether the protocols and thus the testimony in this case were truthful insofar as they relate to defendant. The only protocols made available were those prepared in 1977. At that time defendant was the target of the investigation being conducted by the OSI and the Soviet authorities. If evidence was to be manipulated against him it would have been done at that time.

However, each of the three witnesses who incriminated defendant signed protocols or gave testimony about the critical events on earlier occasions when defendant was not the target. Dailide returned to Kedainiai in 1944 and told the local KGB office of his wartime activities. In 1945 or 1946 he signed a protocol after being interviewed in the procurator's office concerning the

Appendix C

1941 killings. In 1946 Kriunas also signed a protocol concerning the killings in Kedainiai. Silvestravicius testified approximately 10 years ago against Gyls in a trial in which Gyls was charged with having led a detachment of civilians who assisted the Germans during the killings in Kedainiai. In the present case the government charges that Gyls was defendant's deputy in the detachment led by defendant. Thus all the evidence at his trial could be crucial in the present case.

The importance of those protocols and trial testimony is obvious. The statements were made and the testimony given at a time much closer to the event, when memories would be far fresher than they are now—40 years later. Further, defendant probably was not a target on those occasions, and a comparison of the facts related then with the facts related when defendant became a target might well disclose whether evidence has been distorted or manufactured for the purpose of implicating defendant.

The government elected to collaborate in the prosecution of this case with the Soviet Union, a totalitarian state. It has accepted the assistance of Soviet authorities, particularly the testimony of witnesses who had been interrogated by Soviet investigators and from whom statements had been obtained by those interrogators.

Knowing the nature of the Soviet legal system, the government had an obligation to make every effort to ensure that the testimony it received under the auspices of the Soviet authorities was not tainted by the known Soviet practices designed to obtain the desired results in a particular case even at the expense of the truth. If the government deputizes a totalitarian state to obtain for it evidence to be used in a United States court, the government must take whatever steps are necessary to ensure that the evidence was not coerced or otherwise tainted by improper pressures.

Appendix C

The government has not fulfilled its responsibilities in this regard in this case. If it did not know about the earlier testimony and protocols of the Lithuanian witnesses prior to the taking of their testimony in Vilnius in 1982, its investigation was inadequate. If it did know about that material prior to the taking of those depositions, it was remiss in failing to insist upon its production. The government cannot excuse its failure to turn this material over to defendant, as it sought to do during the Kriunas deposition, on the grounds that it had not received the material from the Soviet government. (Kriunas Dep. at 97). At the very least, if the OSI attorneys first learned of the earlier testimony and protocols at the deposition sessions, they should then have insisted that the Soviet authorities produce them. If they were met with a refusal, then suspicions should have been aroused.

During the trial I directed the government to proceed through diplomatic channels or through whatever other channels were available to it to obtain the earlier testimony and protocols. The trial was not held on consecutive days and there was ample time during the period from its commencement on April 5, 1983 until conclusion on June 14 to obtain the documents. On June 14, however, the government reported that in response to its request, "... a return phone call was made by the Minister of Foreign Affairs to the American Embassy that while efforts continue to locate the protocols relating to the Kungys case, it is highly doubtful that they can be located by June 14th. Soviet authorities are not even certain the protocols still exist." (Trial Transcript at 1282). No reference was made to the requested trial transcripts but the government's attorneys assumed that the reference to protocols was also a reference to transcripts. I am left with the distinct impression that the Soviet authorities simply do not wish to produce this material. The most likely reason for not wishing to produce it is that it would reflect adversely on the 1977 protocols

Appendix C

and therefore on the Lithuanian deposition testimony. The net result is that the best evidence from which the accuracy of this testimony can be determined is unavailable and most likely is being withheld by one of the two governments cooperating in the prosecution of this case. Under these circumstances the United States government must accept responsibility for the acts and omissions of its partner.

F. Conclusion: The Lithuanian depositions will be admitted for the limited purpose of establishing the happening of the killings in Kedainiai in July and August 1941. They will not be admitted as evidence that defendant participated in the killings. In summary, the reasons for this ruling are: (i) The Soviet Union, which cooperated with the United States government by making these witnesses available, has a strong state interest in a finding that defendant participated in the Kedainiai killings; (ii) The Soviet legal system on occasion distorts or fabricates evidence in cases such as this involving an important state interest; (iii) These depositions were conducted in a manner which made it impossible to determine if the testimony had been influenced improperly by Soviet authorities in that a Soviet procurator presided over the depositions, a Soviet employee acted as translator, evidencing actual bias in the manner of translation, and the procurator limited cross-examination into the witnesses' prior statements and dealings with Soviet authorities; (iv) The content of the deposition testimony suggests that the Soviet interrogators distorted the witnesses' testimony when they prepared the 1977 protocols; and (v) The United States government failed to obtain and the Soviet government refused or failed to turn over earlier transcripts and protocols of the witnesses which most likely would have disclosed whether the testimony in this case was the subject of improper influence. Exclusion of the deposition testimony except for the limited purpose specified above is consistent with the course

Appendix C

followed by Judge Fullam in *United States v. Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983). In *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981) the Court relied upon videotaped depositions taken in the Soviet Union. However, in that case, defendant's counsel did not choose to attend, the indicia of unreliability existing in the present case were not found to exist, and there was strong corroborative evidence.

Without the use of the deposition testimony the most that the government can establish, viewing its evidence in its most favorable light, is that defendant, despite his claims to the contrary, was in Kedainiai in July and August 1941, that he was a member of the Sauliai, that he misrepresented the date and place of his birth in his various immigration and naturalization papers, and that he failed to disclose in his immigration visa and alien registration forms that he was in Kedainiai at any time during the period from 1940-42.

In order to justify revocation of citizenship, the evidence must be "clear, unequivocal, and convincing," such as not to leave "the issue in doubt". *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943). "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." *Fedorenko v. U.S.*, 449 U.S. 490, 505, 101 S.Ct. 737, 746, 66 L.Ed.2d 686 (1980). As stated by the Third Circuit Court of Appeals in *U.S. v. Riela*, 337 F.2d 986, 988 (1964):

This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt. [Citing *Klapprott v. United States*, 335 U.S. 601, 612, 69 S.Ct. 384, 389, 93 L.Ed. 266 (1949).]

Appendix C

The admissible evidence is insufficient to sustain the government's charges that defendant participated in the July and August 1941 killings in Kedainiai.

IV. Facts Pertaining to Defendant

It is now necessary to turn to the facts about defendant established by the evidence other than the depositions video-taped in the Soviet Union.

Defendant was born on September 21, 1915 in the Village of Reistru, Silales County, Lithuania. He had four brothers and five sisters, and during his childhood he lived at his parents' farm near Reistru Village. After attending local schools, he began studying for the priesthood at the Catholic Seminary at Telsiai in September 1932. In 1938 he left the seminary without having received Holy Orders and in July of that year, when Lithuania was still independent, he began military service. In September 1939 he graduated from the Lithuanian Cadet School in Kaunas and was commissioned as junior lieutenant. He served in the Lithuanian Army until November at which time he was either demobilized or resigned.

Thereafter he obtained employment with the Lithuanian Bank and was assigned to the branch at Kedainiai in late 1939. When he lived in Kedainiai he boarded at the home of the parents of his wife-to-be at No. 3 Radvilu Street. In June 1940 the Soviet Union occupied Lithuania. Defendant remained at the bank in Kedainiai. On June 22, 1941 the Germans attacked the Soviet Union and quickly occupied all of Lithuania.

There is a major dispute between the parties as to when defendant left Kedainiai. Defendant asserts that in late June or

Appendix C

July 1941 he went to Kaunas and commenced working in a printing plant on or about July 6. He produced a certificate of the concern for which he claims to have worked stating that he worked there as of that date. (Exh. A-13). The certificate is somewhat suspect inasmuch as the date when defendant was supposed to have commenced work was a Sunday and its letterhead is written in both Lithuanian and German. This would have represented a rather rapid transition, since the Soviet Army had been driven from the City less than two week before the July 6 date. However, it was certainly not beyond the capabilities of a printing concern to run off such a letterhead and after the German occupation it would have been imprudent to have continued using a Russian designation.

The government contends that defendant did not leave Kedainiai until mid-October 1941, when both sides agree he again entered Telsiai Seminary. The evidence is persuasive that the government's version of the events is correct. Defendant submitted to the Kedainiai branch of the bank a letter dated October 10, 1941 resigning effective October 16, 1941. (Exh. B-17). On September 12, 1981 defendant wrote to a person who might have been able to assist him with pertinent information, stating "I lived in Kedainiai from December, 1939 until October, 1941. I worked at the Bank of Lithuania." (Exh. K-1). I find, therefore, that defendant remained in Kedainiai until October 1941. If there were admissible evidence tending to show that defendant played a part in the killings in Kedainiai in July and August 1941, the falseness of defendant's testimony that he was in Kaunas during those months would tend to corroborate the evidence of his complicity in the killings. Since such evidence is lacking, however, the falseness of defendant's testimony as to the date he left Kedainiai bears primarily upon his credibility generally.

Appendix C

Defendant remained at Telsiai only briefly, leaving after Christmas 1941. He moved to Kaunas where he first went to work for a printing plant and then went to work for a small brush and broom factory, employing perhaps 12 or 15 persons. It was owned and managed by a husband and wife and defendant served as a clerk-bookkeeper. While in Kaunas defendant married Sofija Anuskeviciute, the daughter of the persons with whom he resided while living in Kedainiai. Mrs. Kungys had been studying dentistry and during the war years commenced practicing her profession.

Defendant claims to have participated in the resistance movement referred to above and described in the testimony Vydaudas Vidiekunas. According to defendant he worked with a man named Broius Budginas and together they stole printing equipment for the use of the resistance and printed underground newspapers. There is some independent evidence to support this claim, and there is evidence suggesting that the claim should be viewed with suspicion.

At the end of a March 27, 1981 interview of defendant by attorneys for the OSI, defendant finally admitted that he had given false information in all his immigration and naturalization proceedings as to the date and place of his birth. From the outset he had informed the United States authorities that he was born on October 4, 1913 in Kaunas. The truth, of course, was that he had been born on September 21, 1915 in Reistru.

When on March 27, 1981 defendant admitted that the information as to the date and place of his birth was false, he explained that he made the change in April 1944 because he was being hunted by the German authorities. The German authorities had learned of the identity of members of the Lithuanian resistance in Kaunas in that month. Defendant informed the OSI attorneys

Appendix C

that he was warned to stay away from a meeting at which he would have been arrested and that he thereupon, with the assistance of members of the resistance, obtained a new identification card from the Kaunas Burgomaster's Office showing the false date and place of birth. (Exh. A-1). This card is dated April 26, 1944.

Four considerations cast doubt upon defendant's contention. (i) In his answers to interrogatories submitted in November 1981 defendant stated, in apparent conflict with his March statement, that the reason he obtained the false identification card was to avoid mobilization into the German Army. However, this is not necessarily inconsistent with his March 27, 1981 account since a major objective of the resistance was to enable Lithuanians to avoid conscription by the Germans. (ii) The photograph on the identification card supposedly issued in April 1944 was obviously taken from the same negative as the photograph which accompanied his 1947 visa application, suggesting that perhaps defendant forged the identification card in Germany. It is possible, as he claims, that he brought the negative with him when he fled from Lithuania. (iii) Defendant asserts that he applied for the false identification card in response to the arrest of members of the resistance. According to the Lithuanian Encyclopedia (Exh. T-4), "... the arrests of Vlikas members and their close associates began on April 29-30, 1944," *after* the date when the card was supposed to have been issued to defendant. However, there is always the possibility that the Encyclopedia is in error or that there were other arrests at about that time. Vidiekunas testified that he was arrested on May 4 or 5 but that other members of the resistance had been arrested two weeks previously, which would have been before April 26. (iv) Finally, I fail to understand how merely changing the place and date of birth on an identification card could protect defendant from arrest. As long as he retained

Appendix C

the same name it would seem that the Germans could readily identify and arrest him.

Notwithstanding the doubtful nature of the April 26, 1944 identification card, there is some independent support for defendant's claim that he performed work for the resistance, namely, the deposition testimony of Walter Jansen and the trial testimony of Vidiekunas.

Jansen testified that he lived in Kedainiai and worked for the local government during the German occupation from 1942 to 1944. He and his wife knew the family of defendant's future wife Sofija and visited them often at their home on Radvilu Street. During the 1942-44 period defendant visited at the Radvilu Street home three or four times, according to Jansen. Each time he brought and gave to Jansen approximately 10 copies of an underground, anti-German newspaper printed on 2¼ x 5" paper. Jansen testified that defendant told him he was in the underground and assisted by doing printing work. (Jansen Dep. at 40, 44-48, 54).

At the time he applied for his visa in 1947 defendant presented to the American Vice Consul a certificate dated June 18, 1946 from the Ex-Political Prisoners Committee to the effect that defendant had participated in the resistance movement. (Exh. A-2). The certificate was signed by Vidiekunas, whose participation in the resistance, arrest and confinement in Germany are described above. After liberation by the Allied Forces in 1945, Vidiekunas became a member of the Ex-Political Prisoners Committee. One of the purposes of the Committee was to protect prisoners of war and others from the Russians who sought to deport into Soviet occupied territory those who fled from the Baltic countries. The Committee, after checking, certified those who it determined had participated in the resistance.

Appendix C

Vidiekunas testified, truthfully I am convinced, that "... Mr. Budginas and some other person which I can't remember at this time" told him about defendant's underground activities. (Trial Transcript at 930-931). Budginas told him that he and defendant stole a printing press and transported it out of Kaunas, and that they were engaged in organizing an underground newspaper. Unfortunately Budginas is dead. He did not work in the same underground group as Vidiekunas, but they were imprisoned together in Germany, and Vidiekunas had every reason to rely upon him. It seems unlikely that after his own dangerous service in the anti-German underground Budginas would provide false testimony to assist a person who had collaborated with the Germans. On the other hand it is possible he would have done so to protect a fellow Lithuanian from possible deportation by the feared and hated Russians.

In sum, the evidence is conflicting and much time has passed. It is impossible to state with any degree of certainty whether defendant did or did not participate in the resistance movement.

In any event, defendant worked at the brush and broom factory in Kaunas until July 1944 when the Soviet Army crossed the Lithuanian border. He and his wife then went to his father's farm in Reistru where he worked for farmers until October 1944.

Defendant's flight from Lithuania and eventual settlement in Germany is best described by Yuozas Koncius, who for the last 27 years has been a high school teacher in Illinois and whose testimony has the ring of complete truthfulness.

In October 1944 the Soviet Army occupied the Lithuanian town where Koncius attended school and closed the school. Unable to return to his own home town because of the start of a Soviet

Appendix C

offensive, Koncius and several school friends went to defendant's father's farm in Reistru. Koncius had known defendant's brothers in school.

The day after arriving at the farm the boys helped defendant's father bury family possessions, as the front was expected to reach the area momentarily. Shelling began at the end of the day. Defendant, his wife and a sister arrived at the farm with a horse and wagon. He told them, "Youngsters, if you want to save your necks, get in the wagon and let's get going. This is not a place to stay." (Trial Transcript at 1206).

Defendant and the group in the wagon joined the columns of refugees fleeing the Soviet Army and proceeded to and crossed the German border, where the journey continued. After several days they were stopped by German police. The men were taken off the wagon and the women went on. The men were placed under guard in a barn during the night and during the day were set to work digging trenches.

In some manner communication was made with the women and during the second or third night defendant, his brothers and Koncius escaped and rejoined the women. The horse was hitched to the wagon and the party proceeded westward, traveling by night and resting during the day. Upon reaching the Danzig Corridor they remained with a Polish family for a week, helping on the farm. The horse and wagon were sold and with the proceeds defendant was able to bribe officials and obtain train tickets to Tuebingen in the western part of Germany.

In Tuebingen the group was placed in a refugee camp from which defendant and his brothers went out into the countryside to find work. The men joined prisoners of war and other displaced

Appendix C

persons working on neighboring farms. Defendant and his family found work and a place to live in nearby Poltringen. They stayed there or in neighboring towns until the area was captured by Allied Forces and the end of the war in Europe in May 1945. Until that time and thereafter defendant and his wife were required to register with local authorities. These records all reflect that he was born in Taurage (Reistru) Lithuania (not Kaunas). A few show his date of birth to be September 9, 1908, a few show his date of birth to be October 4, 1913; most show his date of birth to be September 21, 1915. Some of the information in these records concerning defendant's wife is incorrect.

During the period after the War before defendant applied for his visa he sought to take courses given to certain displaced persons without charge at Tuebingen University. In his applications defendant set forth the correct date and place of his birth. He exaggerated somewhat the importance of his role at the brush and broom factory in Kaunas, describing his work as "industrial concern manager". (*E.g.*, Exh. N-2).

In January of 1947 visa applications were processed by vice-consuls stationed at American consulates in Germany, one of which was located at Stuttgart. An applicant was required to fill out forms seeking an immigration visa and an alien registration form and to submit with the forms verifying documents such as birth certificates and police reports. These forms were checked preliminarily by local persons employed by the consulate, and if they were found to be in order they were sent to a vice-counsel for further review. If the vice-counsel also found the forms to be in order he scheduled an interview with the applicant and sought to verify at the interview the information given. Of particular interest in the case of Eastern Europeans was the applicant's residences and occupations during the 1939-1945 period, since that

Appendix C

information tended to indicate the applicant's relationship to the Nazi occupation forces. If satisfied after the interview, the vice-consul forwarded the papers to the consul for issuance of a visa when one became available under the quota.

Defendant and his wife applied to the consulate in Stuttgart for a visa and alien registration form in January 1947. In his application forms (Exh. A-3, A-4) defendant stated that he had been born on October 4, 1913 in Kaunas and that between 1940-1942 he had lived in Telsiai, Lithuania. He stated that during the past five years he had engaged in the following activities: "student, dental technician, farm and forestry work". In support of his statements as to date and place of birth defendant submitted the April 26, 1944 identification card supposedly issued by the Kaunas Burgomaster's Office (Exh. A-1), the certificate of the Ex-Political Prisoners Committee signed by Vidiekunas (Exh. A-2), a certificate as to defendant's date and place of birth issued by the National Delegate of the Vatican for the Lithuanians in Germany and Austria (Exh. A-6) and a police record of the City of Fellbach, Germany.

Thus, as charged by the government and as conceded by the defendant, defendant misrepresented and concealed in his visa application forms the date and place of his birth, the places of his residence during the period 1940-1942 and his occupation as a clerk, bookkeeper, accountant. The government has withdrawn its charges that defendant misrepresented the facts of his marriage, and the government has not established the other misrepresentations which it alleged in the pretrial order.

I cannot understand what benefit defendant expected to achieve by placing his birth in Kaunas rather than Reistru and by dating his birth October 4, 1913 rather than September 21,

Appendix C

1915. It would not, as the government suggests, insulate him from charges of war crimes as long as he continued to use his own name. Defendant had evidence of his place of birth in his possession (Exh. A-18), and with a few exceptions the German municipal records reflected both the correct date and the correct place of his birth. (Exh. J-1—J-15). He could just as well have obtained a correct certificate from the Vatican Delegate as an incorrect one. Further, his forms named the town of Reistru as the residence of his parents. Of course, once started on a falsehood, it becomes ever more difficult to return to the truth.

Ironically, it would appear that had defendant given the correct information in his visa application form, his visa nevertheless would have been issued. There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever. Seymour Maxwell Finger, who served as a vice-counsel in Stuttgart in January 1947 testified that disclosure of a period of residence in Kedainiai in 1941 would not have raised any questions in his mind. This is to be expected because there were few if any significant districts in Lithuania, or in all of eastern Europe for that matter, in which German atrocities against the Jewish population did not take place. Defendant's wife's visa application listed her birth place and residence in Kedainiai. Professor Finger also testified that he would not have denied a visa even to the manager of a 15-employee brush and broom factory, although he might have wished to have asked questions on the subject during the personal interview with the applicant.⁷

7. Professor Finger also testified that in January 1947 under applicable regulations a visa applicant who had no close relatives in the United States was not eligible for a visa unless he could prove that he was a victim of Nazi

Appendix C

Based upon the information that was given by defendant, the United States Consulate at Stuttgart issued defendant on March 4, 1948 Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub.L. No. 68-139, 43 Stat. 153, as amended. Defendant entered the United States on April 29, 1948 upon presentation of his visa.

On May 29, 1948 defendant executed an Application for Certificate of Arrival and Preliminary Form for a Declaration of Intention (Form N-300). (Exh. A-7). He again misrepresented the date and place of his birth. He did not, as originally charged by the government, misrepresent the facts of his marriage.

On October 23, 1953 defendant executed an Application to File Petition for Naturalization and an attached Statement of Facts for Preparation of Petition (Form N-400). (Exh. A-10). The documents were false as to defendant's date and place of birth and in that they stated that defendant had not previously given false testimony to obtain benefits under the immigration and naturalization laws. The government has withdrawn its charges that these documents contain false statements as to defendant's marriage and the evidence does not sustain the government's charge that "Defendant swore that he had never committed a crime

(Cont'd)

persecution. The testimony and regulations in evidence in this case suggest that Professor Finger was in error on this point, although perhaps there was an informal policy at the Stuttgart consulate to prefer Nazi victims. In any event, despite the questions which the evidence raises as to defendant's claim that he participated in the resistance movement, the government's charge that these claims are false is not supported by clear, unequivocal and convincing evidence. Therefore the certificate as to defendant's participation in the resistance (Exh. A-2) has not been established to be false in that respect.

Appendix C

involving moral turpitude when in fact he had participated in the persecution and murder of over 2000 unarmed civilians."

On October 23, 1953, at a naturalization examination defendant reviewed the N-400 Form and swore that the contents were true. On the same date defendant executed under oath at a naturalization examination a Petition for Naturalization (Form N-405). (Exh. A-11). Again defendant misrepresented the date and place of his birth. The government has withdrawn its charge that in the document he misrepresented the facts of his marriage.

On February 3, 1954 the United States District Court of this District granted defendant's petition for naturalization and issued to him a Certificate of Naturalization. (Exh. A-12).

In the 1960's, as described above, the Soviet government resumed its investigations of Baltic emigres on charges of war crimes and collaboration with the Germans, disseminating these charges both in the Soviet Union and in western countries, particularly the United States. In the late 1970's cooperation between the Soviet authorities and the OSI in the prosecution of alleged war criminals commenced. In 1981 this action was instituted to revoke defendant's citizenship.

V. Effect Upon Defendant's Citizenship

The government seeks to revoke defendant's citizenship pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a). That Section, in its present form, provides for revocation of a naturalized citizen's order and certificate of naturalization if they "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." The government proceeds on both

Appendix C

of these statutory grounds—(i) illegal procurement and (ii) concealment of a material fact or willful misrepresentation.

A. Illegal procurement: Citizenship is illegally procured if there is a failure to comply with any of "the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981). In the present case the government urges that defendant's citizenship was illegally obtained because it lacked two congressionally imposed prerequisites: (i) lawful admission into the United States by means of a lawfully acquired immigration visa, 8 U.S.C. § 1427(a)(1) and 8 U.S.C. § 1429 and (ii) good moral character, 8 U.S.C. § 1427(a)(3).

The government asserts that defendant's visa was unlawfully obtained for three reasons: because (i) he had committed acts of persecution and murder, (ii) his misrepresentations and concealments rendered his visa illegally procured and (iii) disclosure of truthful information would have resulted in further investigation and denial of his visa. Reasons (ii) and (iii) coincide with the second statutory ground for the government's action, *i.e.*, concealment of a material fact or willful representation. They will be discussed below in that context.

Reason (i), acts of persecution and murder, finds its legal basis in the requirement in effect at the time that defendant obtained an immigration visa that aliens "who had been guilty of, or who had advocated or acquiesced in, activities or conduct contrary to civilization and human decency on behalf of Axis countries," or similar acts during World War II, were inadmissible into the United States. Act of May 23, 1918 (40 Stat. 559), as amended by the Act of June 21, 1941 (55 Stat. 252) and

Appendix C

Presidential Proclamation No. 2523 of November 14, 1941 (55 Stat. 1696), 10 Fed.Reg. 8995, 8997, 9000 (1945); 8 C.F.R. §§ 175.52(a), 175.53(j), 53(k) (1947s); 22 C.F.R. § 58 (1947s). However, as set forth above, the government has not established "by clear, unequivocal and convincing evidence which does not leave the issue in doubt" that defendant committed acts of persecution and murder. *Schneiderman v. United States*, 320 U.S. 118, 158, 63 S.Ct. 1333, 1352, 87 L.Ed. 1796 (1976). Thus the factual predicate for this claim of illegal procurement has not been established.

The government asserts that defendant lacked the prerequisite of good moral character (i) because he participated in the murder and persecution of unarmed civilians and (ii) because he gave false testimony for the purpose of gaining benefits under the Immigration and Nationality Laws.

The factual basis for the first reason has not been established. The government asserts that false testimony alone without proof of the materiality of the testimony is sufficient to establish lack of good moral character. I do not so read the Supreme Court case cited by the government in support of that proposition. *Berenyi v. District Director*, 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967). In that case the Court noted specifically that the "question asked of the petitioner was certainly material and relevant." 385 U.S. at 638, 87 S.Ct. at 671. The *Chaunt* case and its progeny, discussed below, certainly do not support the government's position. Therefore, again insofar as misrepresentations, under oath or otherwise, are concerned, the government's illegal procurement ground overlaps its concealment or misrepresentation ground.

Apart from charges of concealment and misrepresentation the government has not established its illegal procurement

Appendix C

allegation. In view of this conclusion it is unnecessary to address defendant's argument that he cannot be charged with illegal procurement since at the time when he applied for a visa and for citizenship the Immigration and Nationalities Act did not contain the "illegally-procured" language, see *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964) in which the Court stated, "The legality of the defendant's naturalization must be determined under the applicable provisions of the statutes as they were at the time of his admission to citizenship." (At 989).

B. Concealment and Misrepresentations: Throughout his visa and citizenship proceedings defendant misrepresented the date and place of his birth. In addition in his application for a visa defendant failed to disclose (and therefore concealed) his presence in Kedainiai during the 1940-42 period and he failed to disclose (and therefore concealed) that he had been a bookkeeper-clerk in the Kaunas brush and broom establishment during the 1941-44 period. Defendant in effect perpetuated these non-disclosures or concealments throughout his naturalization proceedings by representing that the information contained in his visa application was correct. The determination must be made whether these misrepresentations and concealments constitute "concealments of a material fact" or "willful misrepresentation" within the meaning of Section 340(a).

Guidance in making this determination is provided by the Supreme Court decisions in *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 130 (1960) and *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981).

In *Chaunt* the United States petitioned under Section 340(a) to revoke and set aside the order admitting petitioner Chaunt to citizenship on the ground that the order had been obtained by

Appendix C

concealment of a material fact or by willful misrepresentation in his petition for naturalization and in his examination under oath. The district court cancelled petitioner's naturalization finding that he had concealed and misrepresented three arrests, his membership in the Communist Party and his lack of allegiance to the United States. The court of appeals affirmed, reaching only the question of concealing the arrests.

The Supreme Court emphasized, as it has done many times before and since, that in view of the grave consequences to the citizen, "naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue . . . in doubt.' " 364 U.S. at 353, 81 S.Ct. at 149. Probably moved by this consideration the Court, reversing the judgment of the court of appeals, formulated a rule which narrows considerably the kinds of concealments and misrepresentations which will provide a basis for denaturalization:

Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

364 U.S. at 352, 353, 81 S.Ct. at 149.

On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of "clear, unequivocal and convincing" evidence that naturalization was illegally procured within the meaning of § 340(a) of the Immigration and Nationality Act.

Appendix C

364 U.S. at 354, 81 S.Ct. at 150.

An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further inquiry. We do not minimize the importance of that disclosure. In this case, however, we are asked to base materiality on the tenuous line of investigation that might have led from the arrests to the alleged communist affiliations.

364 U.S. at 354, 355, 81 S.Ct. at 150.

We only conclude that, in the circumstances of this case, the Government has failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

364 U.S. at 355, 81 S.Ct. at 150-51.

It is clear from the two part *Chaunt* rule that not all false statements or concealments made during the naturalization process will form a basis for revocation of citizenship, even when the person seeking citizenship made the false statements or concealments under oath. The dissent in *Chaunt* emphasized this point, noting, "It is nowhere suggested, for example, that the petitioner's falsehoods were the result of inadvertence or forgetfulness—that they were anything but deliberate lies." (At

Appendix C

356, 81 S.Ct. at 151). This approach reflects the extreme care which the Supreme Court exercises when dealing with revocation of citizenship. The *Chaunt* rule superseded the rule which theretofore had prevailed in the Third Circuit as set forth in *United States v. Montalbano*, 236 F.2d 757 (1956). The *Chaunt* rule is reflected in the Third Circuit opinion in *United States v. Riela*, *supra*.

In *Fedorenko*, the government sought to revoke petitioner Fedorenko's citizenship both on grounds of illegal procurement and on grounds of concealment and misrepresentation. Petitioner failed to disclose in his application for a visa that he had served during World War II as an armed guard at the Nazi concentration camp at Treblinka, Poland. The Displaced Persons Act under which petitioner sought admission to the United States excluded individuals who had "assisted the enemy in persecuting civilians" or who had "voluntarily assisted the enemy forces . . . in their operations."

The district court held that the petitioner did not come under the Act's exclusion of persons who had assisted in the persecution of civilians because he had served involuntarily. The district court, applying the *Chaunt* rule, also held that although disclosure of petitioner's service as a Treblinka guard would have prompted an investigation into his activities, the government had failed to prove that such an inquiry would have uncovered any additional facts warranting denial of a visa. The court of appeals reversed, disagreeing with the district court's interpretation of the second part of the *Chaunt* rule. The court of appeals held that the second *Chaunt* test requires only clear and convincing proof that (a) disclosure of the true facts *would* have led to an investigation and (b) the investigation *might* have uncovered other facts warranting denial of citizenship.

Appendix C

The Supreme Court affirmed the court of appeals but on different grounds. It found that petitioner gave false information in connection with his application for a visa under the Displaced Persons Act, thus bringing into play the Act's provision (analogous to Section 340(a)) that "[a]ny person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013. The Court added, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material' facts. The first issue we must examine then, is whether petitioner's false statements about his activities during the war, particularly the concealment of his Treblinka service, were 'material.' " 449 U.S. at 507, 508, 101 S.Ct. at 748.

The Court did not decide whether the *Chaunt* test of materiality applied. It noted that *Chaunt* involved statements made during applications for citizenship whereas *Fedorenko* involved statements made during applications for visas prior to entry into the United States. The present case, of course, involves statements made both when defendant applied for a visa and when defendant applied for citizenship.

As to the visa application stage the Court held that "[a]t the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." 449 U.S. at 509, 101 S.Ct. at 749. The Court then held that the true facts about petitioner's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the Displaced Persons Act. Thus his certificate of citizenship was revocable as "illegally procured" under § 340(a).

Appendix C

The concurring and two dissenting opinions in *Fedorenko* analyze in some detail the second *Chaunt* test of materiality.

Justice Blackmun, concurring, failed "to see any relevant limitation in the *Chaunt* decision or the governing statute that bars *Chaunt's* application to this case. By its terms, the denaturalization statute at the time of *Chaunt*, as now, was not restricted to any single stage of the citizenship process. Although in *Chaunt* the nondisclosure arose in response to a question on a citizenship application form filed some years after the applicant first arrived in this country, nothing in the language or import of the opinion suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country. If such a distinction was intended, it has eluded the several courts that unquestioningly, have applied *Chaunt's* materiality standard when reviewing alleged distortions in the visa request process." 449 U.S. at 519, 101 S.Ct. at 754.

Justice Blackmun concluded that the minimal test of materiality set forth in *Fedorenko* was equivalent to the first test of *Chaunt* — facts which if known would have warranted a denial of eligibility are material. Thus application of the *Chaunt* test to the *Fedorenko* facts would have produced the same result. Justice Blackmun rejected the court of appeals test "which would have diluted materiality":

The Court of Appeals reasoned that materiality was established if the non-disclosed facts would have triggered an inquiry that might have uncovered unproved and disqualifying facts. See 597 F.2d 946, 950-951 (CA5 1979). By concluding that the Government has demonstrated the actual existence of disqualifying facts—facts

Appendix C

that themselves would have warranted denial of petitioner's citizenship—this Court adheres to a more rigorous standard of proof. I believe that *Chaunt* indeed contemplated only this rigorous standard, and I suspect the Court's reluctance explicitly to apply it stems from a desire to sidestep the confusion whether *Chaunt* created more than one standard.

Chaunt, to be sure, did announce a disjunctive approach to the inquiry into materiality, but several factors support the conclusion that under either "test" the Government's task is the same; it must prove the existence of disqualifying facts, not simply facts that might lead to hypothetical disqualifying facts.

. . . I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its "two tests" are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of *Chaunt* is consistent with the actual language of the so-called second test; it also appears to be the meaning that the dissent in *Chaunt* believed the Court to have intended.

Significantly, this view accords with the policy considerations informing the Court's decisions in the area of denaturalization. If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion.

Appendix C

449 U.S. at 523-526, 101 S.Ct. at 756-757.

In his dissent Justice White disagreed with Justice Blackmun's interpretation of *Chaunt's* materiality test, stating:

Under the District Court's interpretation of the second *Chaunt* test and that urged by petitioner, the Government would be required to prove that an investigation prompted by a complete truthful response would have revealed facts justifying denial of citizenship. The Court of Appeals and the Government would be required to prove that an investigation prompted by a complete truthful response *would have* revealed facts justifying denial of citizenship. The Court of Appeals and the Government contend that under the second *Chaunt* test the Government must prove only that such an investigation *might have* led to the discovery of facts justifying denial of citizenship. In my opinion, the latter interpretation is correct.

449 U.S. at 528, 101 S.Ct. at 758.

In a footnote Justice White explained what the burdens of proof would be under his interpretation of *Chaunt*:

The Government should be required to prove that an investigation *would have* occurred if a truthful response had been given, and that the investigation *might have* uncovered facts justifying denial of citizenship. The defendant could rebut the Government's showing that the investigation

Appendix C

might have led to the discovery of facts justifying denial of citizenship by establishing that the underlying facts would not have justified denial of citizenship.

449 U.S. at 538, fn. 8, 101 S.Ct. at 758 fn. 8.

In his dissenting opinion Justice Stevens concluded that the Court's construction of the Displaced Persons Act was erroneous and, disagreeing with Justice White, that the court of appeals had misapplied the *Chaunt* test. Concerning the second prong of the *Chaunt* test he wrote:

The Court and the parties seem to assume that the [second] *Chaunt* test contains only two components: (1) whether a truthful answer might have or would have triggered an investigation, and (2) whether such an investigation might have or would have revealed a disqualifying circumstance. Under this characterization of the *Chaunt* test, the only dispute is what probability is required with respect to each of the two components. There are really three inquiries, however: (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would

Appendix C

have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful answer would have prompted more inquiry. Thus I would presume that an investigation, if begun at the time that the misstatement was made, would have been successful in finding whatever the Government is now able to prove. But if the Government is not able to prove the existence of facts that would have made the resident alien ineligible for citizenship at the time he executed his application, I would not denaturalize him on the basis of speculation about what might have been true years ago.

449 U.S. at 537, 101 S.Ct. at 762-763.

To summarize: *Chaunt* and *Fedorenko* in combination leave us with a number of rules which could be applied in determining if defendant's misstatements and concealments were material and therefore a basis for loss of citizenship under Section 340(a). Certain of the rules are inconsistent.

Chaunt itself states that to succeed under Section 340(a) the government must prove (i) that facts were suppressed which, if known, would have warranted denial of citizenship of (ii) that disclosure of the true facts might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. The first *Chaunt* test is clear

Appendix C

and unambiguous and courts have had no difficulty applying it. Interpretation and application of the second *Chaunt* test, however, is in a process of evolution, as evidenced by the four opinions in *Fedorenko*.

The majority opinion in *Fedorenko* did not decide whether *Chaunt* is applicable at the visa application stage and therefore did not address itself to either *Chaunt* test. It did hold that at the visa application stage at the very least a misrepresentation is material if disclosure of the true facts would have made the applicant ineligible for a visa. In effect the Court applied the first *Chaunt* test to the visa application proceedings.

Justice Blackmun concluded that there is in reality only one *Chaunt* test, that the so-called second test is simply another method of stating what the government must establish, namely the existence of facts which would disqualify a person from citizenship.

Justice White would give independent effect to the second *Chaunt* test. According to his formulation of that test materiality would be established if the government proves by clear, unequivocal and convincing evidence that an investigation *would have* occurred if a truthful response had been given and that the investigation *might have* uncovered facts justifying denial of citizenship.

Justice Stevens concluded that the second *Chaunt* test required that the government establish by the requisite quantum of evidence that a truthful answer *would have* led to an investigation and that disqualifying circumstances *actually* existed. If those two elements were proved, Justice Stevens would presume that the investigation would have been successful in discovering the disqualifying facts.

Appendix C

It is necessary to apply these various tests to defendant's misrepresentations and concealments to determine whether they were "material" within the meaning of Section 340(a) as applied by the Supreme Court. In doing so I have been mindful of Justice Stevens' cautionary observation in *Fedorenko*, that "[t]he gruesome facts recited in this record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment." 449 U.S. at 538, 101 S.Ct. at 763.

I believe that it is most probable that when the Supreme Court decides the question it will apply *Chaunt* to the visa application stage as well as the citizenship application stage. There is no reason I can think of not to do so. The concurring and dissenting Justices in *Fedorenko* applied *Chaunt* to both stages. In any event the *Fedorenko* majority opinion suggests some tests will be applicable to the visa application stage similar to the *Chaunt* test or tests. I have concluded that defendant's concealments and misrepresentations both singly and in the aggregate do not meet the requirement of materiality under any of the formulations set forth above.

Clearly the first *Chaunt* test is not met. None of the suppressed facts, if known, would have warranted denial of citizenship. Birth in Reistru on September 21, 1915, residence in Kedainiai during part of the 1940-1942 period, and employment in whatever capacity in a mom and pop brush and broom establishment are not facts which, if known, would have warranted denial of citizenship.

By the same token, the minimal test under *Fedorenko's* majority opinion has not been met. Disclosure of these facts would not have made defendant ineligible for a visa.

Finally, defendant's misrepresentations and concealments would not be deemed material for Section 340(a) purposes under

Appendix C

any of the interpretations of the second *Chaunt* test.

Justice Blackmun's view that under either *Chaunt* test the government must establish facts which would disqualify a person from citizenship forecloses the government here. The government had not established such facts by admissible evidence.

Justice Stevens' formulation of the second *Chaunt* test required that the government must establish not only that a truthful answer would have led to an investigation but also that disqualifying circumstances actually existed. Actual existence of the disqualifying circumstances has not been established.

Under Justice White's interpretation of the second *Chaunt* test the government must establish by the requisite quantum of evidence that truthful and complete responses by defendant *would have* resulted in an investigation and that the investigation *might have* uncovered facts justifying denial of citizenship. The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation. Certainly there was nothing which would excite suspicion in the fact that defendant was born in Reistru in the year 1915. Professor Finger, a vice-consul who passed on visa applications at the time defendant and his wife applied, testified that the fact of residence in Kedainiai during 1940-42 would not have raised any questions in his mind. He also testified that wartime employment in a management capacity in a 15 employee brush and broom factory in Kaunas might have prompted him to ask further questions at the personal interview. This is far from proof by clear, unequivocal and convincing evidence that an investigation would have occurred if defendant had given truthful responses to all four of the matters as to which his answers were false. It is unnecessary to pursue the second phase of Justice White's formulation to determine if an

Appendix C

investigation might have uncovered facts justifying denial of citizenship. Even by the least onerous test of materiality (Justice White's formulation) the government has failed to establish concealment of a material fact or willful misrepresentation.

The government's proofs are inadequate to establish any of the bases for revocation of defendant's citizenship. Judgment, therefore will be entered for the defendant. The defendant's attorneys are requested to submit an appropriate form of order.

APPENDIX D—STATUTE INVOLVED**§ 340 of the Immigration and Nationality Act of 1952, As Amended, 8 U.S.C. § 1451(a):**

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1429 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of the certificate of naturalization shall be effective as of the original date of the order and certificate, respectfully: Provided that refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the

Appendix D

proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

APPENDIX E—FEDERAL REGISTER, DECEMBER 24, 1946

TITLE 22—FOREIGN RELATIONS

Chapter I—Department of State

PART 61—VISAS; DOCUMENTS REQUIRED OF ALIENS
ENTERING THE UNITED STATES

PRIORITY OF QUOTA IMMIGRANTS

Pursuant to the authority contained in section 24 of the Act of May 26, 1924 (43 Stat. 166; 8 U.S.C. 222) and in section 1 of Reorganization Plan No. V (3 CFR, Cum. Supp., Ch. IV), Title 22, Part 61, of the Code of Federal Regulations (Departmental Regulation 108.12; 11 F.R. 8904), is hereby amended to read as follows:

§ 61.313 *Priority of quota immigrants—*
(a) * * *

(3) *Nonpreference.* * * *

(i) *First-priority nonpreference class.* The first-priority nonpreference category of quota immigrants shall consist of the following:

(a) Aliens who have served honorably in the armed forces of the United States, and the alien widows, parents, unmarried minor children, and unmarried minor step-children of citizens of the United States (including deceased citizens) who have so served, and aliens who have served honorably as seamen for at least one year on vessels

Appendix E

of countries of the United Nations engaged in sailing from ports in the United States, the service in either case having occurred during the period of the war that began on September 1, 1939, such persons not having voluntarily abandoned such service or occupation so long as they were not physically incapacitated for such service.

(b) Aliens who have been recommended by the Joint Chiefs of Staff as persons whose admission is highly desirable in the national interest, provided that such cases have been approved by all appropriate governmental agencies.

(c) Displaced persons covered by the President's directive of December 22, 1945 and his directive of October 31, 1946.

Aliens in the first-priority nonpreference class shall have their applications for nonpreference-quota immigration visas considered only after consideration shall have been given to the applications of all first-preference and second-preference immigrants awaiting visas. Aliens in the first-priority nonpreference-quota category shall have their applications for visas considered in the order in which their registration forms were properly filled out and received at the consular office, but consideration need not be given to the visa application of any alien in this category unless a quota number is likely to be available for use in issuing a visa to him.

Appendix E

All provisions of this section shall become effective on the date of its publication in the FEDERAL REGISTER. The publication of notice and the public procedure referred to in section 4 of the Administrative Procedure Act (60 Stat. 238) with respect to the substantive provisions of this regulation are not required because this regulation involves military and foreign-affairs functions.

(Sec. 24, 43 Stat. 166; 8 U.S.C. 222; sec. 1 Reorganization Plan No. V, 3 CFR Cum. Supp. Chapter IV)

[SEAL]

DEAN ACHESON,
Acting Secretary of State

DECEMBER 14, 1946

Recommended: December 17, 1946.

TOM C. CLARK,
Attorney General.

[F. R. Doc. 46-21860; Filed, Dec. 23, 1946; 8:47 a.m.]

**APPENDIX F—STATEMENT AND DIRECTIVE OF
PRESIDENT TRUMAN, DECEMBER 22, 1945**

- 225 Statement and Directive by the President on
Immigration to the United States of Certain
Displaced Persons and Refugees in Europe.
December 22, 1945

THE WAR has brought in its wake an appalling dislocation of populations in Europe. Many humanitarian organizations, including the United Nations Relief and Rehabilitation Administration, are doing their utmost to solve the multitude of problems arising in connection with this dislocation of hundreds of thousands of persons. Every effort is being made to return the displaced persons and refugees in the various countries of Europe to their former homes. The great difficulty is that so many of these persons have no homes to which they may return. The immensity of the problem of displaced persons and refugees is almost beyond comprehension.

A number of countries in Europe, including Switzerland, Sweden, France, and England, are working toward its solution. The United States shares the responsibility to relieve the suffering. To the extent that our present immigration laws permit, everything possible should be done at once to facilitate the entrance of some of these displaced persons and refugees into the United States.

In this way we may do something to relieve human misery, and set an example to the other countries of the world which are able to receive some of these war sufferers. I feel that it is essential that we do this ourselves to show our good faith in requesting other nations to open their doors for this purpose.

Most of these persons are natives of Central and Eastern Europe and the Balkans. The immigration quotas for all these

Appendix F

countries for one year total approximately 39,000, two-thirds of which are allotted to Germany. Under the law, in any single month the number of visas issued cannot exceed ten per cent of the annual quota. This means that from now on only about 3900 visas can be issued each month to persons who are natives of these countries.

Very few persons from Europe have migrated to the United States during the war years. In the fiscal year 1942, only ten per cent of the immigration quotas was used; in 1943, five per cent; in 1944, six per cent; and in 1945, seven per cent. As of November 30, 1945, the end of the fifth month of the present fiscal year, only about ten per cent of the quotas for the European countries has been used. These unused quotas however do not accumulate through the years, and I do not intend to ask the Congress to change this rule.

The factors chiefly responsible for these low immigration figures were restraints imposed by the enemy, transportation difficulties, and the absence of consular facilities. Most of those Europeans who have been admitted to the United States during the last five years were persons who left Europe prior to the war, and thereafter entered here from non-European countries.

I consider that common decency and the fundamental comradeship of all human beings require us to do what lies within our power to see that our established immigration quotas are used in order to reduce human suffering. I am taking the necessary steps to see that this is done as quickly as possible.

Of the displaced persons and refugees whose entrance into the United States we will permit under this plan, it is hoped that the majority will be orphaned children. The provisions of law prohibiting the entry of persons likely to become public charges

Appendix F

will be strictly observed. Responsible welfare organizations now at work in this field will guarantee that these children will not become public charges. Similar guarantees have or will be made on behalf of adult persons. The record of these welfare organizations throughout the past years has been excellent, and I am informed that no persons admitted under their sponsorship have ever become charges on their communities. Moreover, many of the immigrants will have close family ties in the United States and will receive the assistance of their relatives until they are in a position to provide for themselves.

These relatives or organizations will also advance the necessary visa fees and travel fare. Where the necessary funds for travel fare and visa fees have not been advanced by a welfare organization or relative, the individual applicant must meet these costs. In this way the transportation of these immigrants across the Atlantic will not cost the American taxpayers a single dollar.

In order to enter the United States it is necessary to obtain a visa from a consular officer of the Department of State. As everyone knows, a great many of our consular establishments all over the world were disrupted and their operations suspended when the war came. It is physically impossible to reopen and to restaff all of them overnight. Consequently it is necessary to choose the area in which to concentrate our immediate efforts. This is a painful necessity because it requires us to make an almost impossible choice among degrees of misery. But if we refrain from making a choice because it will necessarily be arbitrary, no choice will ever be made and we shall end by helping no one.

The decision has been made, therefore, to concentrate our immediate efforts in the American zones of occupation in Europe.

Appendix F

This is not intended however entirely to exclude issuance of visas in other parts of the world.

In our zones in Europe there are citizens of every major European country. Visas issued to displaced persons and refugees will be charged, according to law, to the countries of their origin. They will be distributed fairly among persons of all faiths, creeds and nationality.

It is intended that, as soon as practicable, regular consular facilities will be reestablished in every part of the world, and the usual, orderly methods of registering and reviewing visa applications will be resumed. The pressing need, however, is to act now in a way that will produce immediate and tangible results. I hope that by early spring adequate consular facilities will be in operation in our zones in Europe, so that immigration can begin immediately upon the availability of ships.

I am informed that there are various measures now pending before the Congress which would either prohibit or severely reduce further immigration. I hope that such legislation will not be passed. This period of unspeakable human distress is not the time for us to close or to narrow our gates. I wish to emphasize, however, that any effort to bring relief to these displaced persons and refugees must and will be strictly within the limits of the present quotas as imposed by law.

There is one particular matter involving a relatively small number of aliens. President Roosevelt, in an endeavor to assist in handling displaced persons and refugees during the war and upon the recommendation of the War Refugee Board, directed that a group of about 1000 displaced persons be removed from refugee camps in Italy and settled temporarily in a War Relocation

Appendix F

Camp near Oswego, New York. Shortly thereafter, President Roosevelt informed the Congress that these persons would be returned to their homelands after the war.

Upon the basis of a careful survey by the Department of State and the Immigration and Naturalization Service, it has been determined that if these persons were not applying for admission to the United States most of them would be admissible under the immigration laws. In the circumstances, it would be inhumane and wasteful to require these people to go all the way back to Europe merely for the purpose of applying there for immigration visas and returning to the United States. Many of them have close relatives, including sons and daughters, who are citizens of the United States and who have served and are serving honorably in the armed forces of our country. I am therefore directing the Secretary of State and the Attorney General to adjust the immigration status of the members of this group who may wish to remain here, in strict accordance with existing laws and regulations.

The number of persons at the Oswego camp is, however, comparatively small. Our major task is to facilitate the entry into the United States of displaced persons and refugees still in Europe. To meet this larger problem, I am directing the Secretary of State, the Attorney General, the Secretary of War, the War Shipping Administrator and the Surgeon General of the Public Health Service to proceed at once to take all appropriate steps to expedite the quota immigration of displaced persons and refugees from Europe to the United States. Representatives of these officials will depart for Europe very soon to prepare detailed plans for the prompt execution of this project.

The attached directive has been issued by me to the responsible

Appendix F

government agencies to carry out this policy. I wish to emphasize, above all, that nothing in this directive will deprive a single American soldier or his wife or children of a berth on a vessel homeward bound, or delay their return.

This is the opportunity for America to set an example for the rest of the world in cooperation towards alleviating human misery.

DIRECTIVE BY THE PRESIDENT ON IMMIGRATION TO
THE UNITED STATES OF CERTAIN DISPLACED PERSONS
AND REFUGEES IN EUROPE

Memorandum to: Secretary of State, Secretary of War, Attorney General, War Shipping Administrator, Surgeon General of the Public Health Service, Director General of UNRRA:

The grave dislocation of populations in Europe resulting from the war has produced human suffering that the people of the United States cannot and will not ignore. This Government should take every possible measure to facilitate full immigration to the United States under existing quota laws.

The war has most seriously disrupted our normal facilities for handling immigration matters in many parts of the world. At the same time, the demands upon those facilities have increased many-fold. It is, therefore, necessary that immigration under the quotas be resumed initially in the areas of greatest need. I, therefore, direct the Secretary of State, the Secretary of War, the Attorney General, the Surgeon General of the Public Health Service, the War Shipping Administrator, and other appropriate officials to take the following action:

Appendix F

The Secretary of State is directed to establish with the utmost despatch consular facilities at or near displaced persons and refugee assembly center areas in the American zones of occupation. It shall be the responsibility of these consular officers, in conjunction with the Immigrant Inspectors, to determine as quickly as possible the eligibility of the applicants for visas and admission to the United States. For this purpose the Secretary will, if necessary, divert the personnel and funds of his Department from other functions in order to insure the most expeditious handling of this operation. In cooperation with the Attorney General, he shall appoint as temporary vice-consuls, authorized to issue visas, such officers of the Immigration and Naturalization Service as can be made available for this program. Within the limits of administrative discretion, the officers of the Department of State assigned to this program shall make every effort to simplify and to hasten the process of issuing visas. If necessary, blocs of visa numbers may be assigned to each of the emergency consular establishments. Each such bloc may be used to meet the applications filed at the consular establishment to which the bloc is assigned. It is not intended however entirely to exclude the issuance of visas in other parts of the world.

Visas should be distributed fairly among persons of all faiths, creeds and nationalities. I desire that special attention be devoted to orphaned children to whom it is hoped the majority of visas will be issued.

With respect to the requirement of law that visas may not be issued to applicants likely to become public charges after admission to the United States, the Secretary of State shall cooperate with the Immigration and Naturalization Service in perfecting appropriate arrangements with welfare organizations in the United States which may be prepared to guarantee financial

Appendix F

support to successful applicants. This may be accomplished by corporate affidavit or by any means deemed appropriate and practicable.

The Secretary of War, subject to limitations imposed by the Congress on War Department appropriations, will give such help as is practicable in:

(a) Furnishing information to appropriate consular officers and Immigrant Inspectors to facilitate in the selection of applicants for visas; and

(b) Assisting until other facilities suffice in: (1) transporting immigrants to a European port; (2) feeding, housing and providing medical care to such immigrants until embarked; and

(c) Making available office facilities, billets, messes, and transportation for Department of State, Department of Justice, and United Nations Relief and Rehabilitation Administration personnel connected with this work, where practicable and requiring no out-of-pocket expenditure by the War Department and when other suitable facilities are not available.

The Attorney General, through the Immigration and Naturalization Service, will assign personnel to duty in the American zones of occupation to make the immigration inspections, to assist consular officers of the Department of State in connection with the issuance of visas, and to take the necessary steps to settle the cases of those aliens presently interned at Oswego through appropriate statutory and administrative processes.

The Administrator of the War Shipping Administration will make the necessary arrangements for water transportation from

Appendix F

the port of embarkation in Europe to the United States subject to the provision that the movement of immigrants will in no way interfere with the scheduled return of service personnel and their spouses and children from the European theater.

The Surgeon General of the Public Health Service will assign to duty in the American zones of occupation the necessary personnel to conduct the mental and physical examinations of prospective immigrants prescribed in the immigration laws.

The Director General of the United Nations Relief and Rehabilitation Administration will be requested to provide all possible aid to the United States authorities in preparing these people for transportation to the United States and to assist in their care, particularly in the case of children in transit and others needing special attention.

In order to insure the effective execution of this program, the Secretary of State, the Secretary of War, the Attorney General, War Shipping Administrator and the Surgeon General of the Public Health Service shall appoint representatives to serve as members of an interdepartmental committee under the Chairmanship of the Commissioner of Immigration and Naturalization.

HARRY S. TRUMAN

**APPENDIX G—DEPARTMENT OF STATE CIRCULAR,
JULY 8, 1947**

July 8, 1947

DEPARTMENT OF STATE

**INFORMATION CONCERNING IMMIGRATION INTO THE
UNITED STATES FROM GERMANY AND AUSTRIA**

In his directive of December 22, 1945, the President ordered the establishment of facilities and procedures for the resumption of immigration from Europe to the United States, with particular attention to be given to Displaced Persons.

Consular offices of the United States have been established in the following cities of Germany:

**BERLIN FRANKFORT MUNICH BREMEN
HAMBURG STUTTGART**

All of the offices will receive and consider

- (1) Applications for nonquota visas by wives; husbands (married prior to July 1, 1932) and unmarried minor children of American citizens;
- (2) Applications for first-preference quota visas by husbands (married on or after July 1, 1932) and parents of American citizens, and skilled agriculturists;
- (3) Applications for second-preference quota visas by wives and unmarried minor children of permanent alien residents of the United States;

Appendix G

(4) Applications for nonquota visas by former women citizens of the United States who lost their citizenship by reason of marriage to an alien, or the loss of citizenship by husband or by marriage to an alien and residence in a foreign country;

(5) Applications for appropriate visas by fiancées (fiancés) of American citizens serving in or having an honorable discharge from the Armed Forces of the United States during the Second World War;

(6) Applications for visitors visas by bona fide nonimmigrants whose visits to the United States are certified by the United States military authorities in Germany and Austria to be in the national interest.

In addition to visa applications of the categories described above, quota immigration visa applications of displaced persons who are now and were resident in the American zones of occupation in Germany and Austria or the British or American sectors of Berlin and Vienna on and before December 22, 1945 may be made to the appropriate consular officer.

Applications may also be made for nonquota visas by displaced persons residing in the areas above mentioned since before December 22, 1945 who can qualify for nonquota status as ministers of religion or professors of colleges or universities, as described in Section 4(d) of the Immigration Act of 1924, as amended, or who can qualify as bona fide students under Section 4(e) of the Act.

Displaced persons who are now and were resident in the

Appendix G

American and British sectors of Vienna on and before December 22, 1945 may file visa applications with the American Mission at Vienna. Those displaced persons who are residing in the American occupied zone of Upper Austria may communicate with a representative of the American Mission at Vienna who is now temporarily stationed in American Army Headquarters at Slazburg for the preliminary clearance of immigration cases of displaced persons from the said zone.

Persons residing in Austria who come within categories (1), (2), (3), (4), (5) and (6) described above should apply for appropriate visas at the Mission at Vienna.

As mail service between the United States and Germany as well as Austria has been reopened, it is suggested that relatives or friends resident in the United States who are able and willing to give financial assistance and assurance of support to persons falling within the specified categories forward affidavits in each case direct to the alien concerned for his use in filing an application for an immigration visa. According to information received from the Postal authorities, first class mail up to the amount of one pound may now be sent to Germany and Austria, either by air or by surface mail facilities.

Sponsors who wish to defray the cost of the visa fees amounting to \$10.00 on behalf of each visa applicant may send this amount to the Department in the form of a money order or a certified check to the order of the Secretary of State with a covering letter giving the name of the alien, his address and the nearest consular office. The funds so deposited will be held in a special account and the appropriate consular officer will be notified by the Department regarding the deposit made to cover the visa fees for the alien in question.

Appendix G

QUOTAS

Under the laws of the United States, immigration quotas are based upon country of birth. The largest groups of displaced persons are natives of countries whose combined quotas amount to approximately 39,000 each year. (Included in this number are the German quota of 25,957 and the Polish quota of 6,524). Visas not to exceed ten percent of the quota of any country may be issued in any one month.

No indication can be given at this time as to when visa services will be available for persons residing in Germany and Austria whose cases do not fall within the above categories.

APPENDIX H—TUEBINGEN RESIDENCE PERMIT AND TRANSLATION

Paßersatz

für Günther Weisner

Der vorliegende Paß

gilt als Paßersatz im Sinne des § 36 der
Paßgesetzgebung vom 7. Juni 1933
bis zum 1. April 1945

Tübingen, den 12. Feb. 1945
Der Landrat
Im Auftrag:
[Signature]
P.-Verz.



Nr.: 22

Aufenthaltserlaubnis

Wohnort: Tübingen

(Gebietsbereich)
bis 1. April 1945

Ordn.-Nr.: 434/45

Tübingen, den 12. Feb. 1945



Der Landrat

- Ausländeramt -

[Signature]

BEST AVAILABLE COPY

Appendix H

N. 108.

La validité de la
présente pièce d'identité
N° 14432 délivrée à
M-me Zofija
Anuskeviciute, née le 22nd 1919.
ressortissant lithuanien
est prolongée jusqu'à
31 décembre 1946

Consul de Lituanie



[Handwritten signature]

Bureau of Passports for
the Interior

Form
August 24, 1943.

Provisional Identity Card No 14432.
Valid till February 24, 1944

Surname Anuskeviciute
Father's Name Antanas

Name Zofija.
Date of Birth Dec. 22.
or Age
and Place of Birth T.

BEST AVAILABLE COPY

Appendix H

CERTIFICATION OF TRANSLATION

Pursuant to 28 U.S.C. 1746, I certify under the penalty of perjury that the attached document in English, Residence Permit, dated 13 February 1945 is a true and accurate translation of the designated portions of pages of the attached document in German, Aufenthaltserlaubnis, vom. 13. Februar 1945 to the best of my knowledge and belief.

Executed this 1st day
of June, 1982

s/ C. R. Householder

Claudia R. Householder
CRH AND ASSOCIATES
Corporate Member of American
Translators Assoc.

Certified Translator of German

FEE: [illegible] Reich Mark

Appendix H

RESIDENCE PERMIT

Wuerttemberg and Hohenzollern

(area of applicability)

until 1 February 1947

Ref. No.: 431/44

Tuebingen: 13 February 1945

The Provincial Council
-Office for Foreigners-

By Order

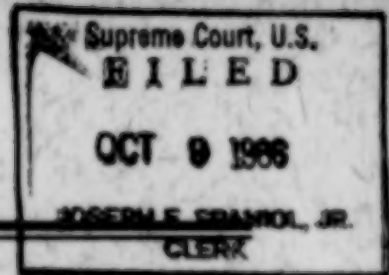
/sig/ illegible

Seal:

The Provincial Council

Tuebingen

No. 86-228



In the Supreme Court of the United States
OCTOBER TERM, 1986

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

2118

QUESTIONS PRESENTED

1. Whether petitioner made material misrepresentations of fact in his visa application and in his citizenship petition and allied documents, requiring his denaturalization under 8 U.S.C. 1451(a).

2. Whether the court of appeals failed to comply with Fed. R. Civ. P. 52(a) in reviewing the district court's factual findings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<i>Chaunt v. United States</i> , 364 U.S. 350	5
<i>Kassab v. INS</i> , 364 F.2d 806	12
<i>La Madrid-Peraza v. INS</i> , 492 F.2d 1297	12
<i>Langhammer v. Hamilton</i> , 295 F.2d 642	12
<i>Maikovskis v. INS</i> , 773 F.2d 435, cert. denied, No. 85-1483 (June 16, 1986)	11
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273	14-15
<i>Schneiderman v. United States</i> , 320 U.S. 118.....	14
<i>United States v. Fedorenko</i> , 597 F.2d 946, aff'd, 449 U.S. 490	5, 7, 11-12, 15
<i>United States v. Koziy</i> , 728 F.2d 1314, cert. denied, 469 U.S. 835	11
<i>United States v. Masters</i> , 484 F.2d 1251	9
<i>United States v. Moore</i> , 613 F.2d 1029, cert. denied, 446 U.S. 954	9
<i>United States v. Notarantonio</i> , 758 F.2d 777	9
<i>United States v. Romanov</i> , 509 F.2d 26	9
<i>United States v. Rossi</i> , 299 F.2d 650	13
<i>United States v. Sheshtawy</i> , 714 F.2d 1038	12

Statutes and rule:

8 U.S.C. 1101 (f) (6)	2
8 U.S.C. 1427 (a)	2
8 U.S.C. 1427 (d)	2
8 U.S.C. 1451 (a)	5, 7
8 U.S.C. 1451 (a) (1)	2
18 U.S.C. 1001	9
18 U.S.C. 1623	9
26 U.S.C. 7206	9
Fed. R. Civ. P. 52 (a)	13, 16



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*ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 793 F.2d 516. The opinion of the district court (Pet. App. 39a-137a) is reported at 571 F. Supp. 1104.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on June 20, 1986. The petition for a writ of certiorari was filed on August 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government brought this denaturalization suit against petitioner under 8 U.S.C. 1451(a)(1), claiming that petitioner's citizenship was illegally procured and was obtained by concealment of a material fact. The government alleged that (1) petitioner participated with Nazi occupation forces in Lithuania in the execution of more than 2,000 unarmed Lithuanian civilians in July and August 1941; (2) petitioner misrepresented certain material facts in his visa application and in his naturalization petition and allied documents, such as his date and place of birth, and his occupation and residence during World War II; and (3) petitioner lacked "good moral character," under 8 U.S.C. 1101(f)(6) and 1427(a) and (d), at the time he applied for citizenship, because he committed the above atrocities and because he gave false testimony to obtain a visa and his citizenship. Following a bench trial, the district court ruled in petitioner's favor, finding that the government had failed to prove the allegations in its complaint (Pet. App. 39a-137a). The court of appeals reversed (Pet. App. 1a-37a).

1. Petitioner lived in Kedainiai, Lithuania, in 1941 when Nazi forces invaded that area. In July and August of that year, as part of a large-scale operation to exterminate the Eastern European Jewish population, the Nazis, aided by members of certain local civilian organizations, forced more than 2,000 unarmed Jewish men, women, and children in Kedainiai to undress and enter a ditch, where they were shot and their bodies were covered with lime (Pet. App. 48a-62a, 69a-73a).¹ During that two

¹ Nazi commando units responsible for the operations sometimes used local people to assist them in such killings (Pet. App. 50a-51a, 52a, 55a, 57a-58a, 62a).

month period, petitioner worked for the Bank of Lithuania in Kedainiai, where he remained until October 1941 (*id.* at 7a, 111a). Petitioner was also a member of the Sauliai, a local association which trained its members in military matters and served as an auxiliary police force assisting the Nazi occupation forces (*id.* at 7a, 70a, 109a).² After leaving Kedainiai, petitioner moved to Kaunas, Lithuania, where he worked in a small brush and broom factory. In October 1944, petitioner and his wife left Lithuania as the Soviet Army advanced. From Lithuania they moved to Tuebingen, in Nazi-occupied Germany. There, petitioner was given permission by the Nazi regime to live without restrictions, and his wife applied for permission to practice dentistry. Petitioner and his wife remained in the Tuebingen area until Allied Forces occupied the area in May 1945 (*id.* at 7a, 115a-117a).

In January 1947, petitioner and his wife applied at the American consulate in Stuttgart, Germany, for a nonpreference quota immigration visa (Pet. App. 118a). Although petitioner had given the Nazi authorities in Tuebingen his true date and place of birth and his true wartime occupations, he gave the American consulate officials false information regarding each of those items when he applied for a visa. In addition, petitioner falsely claimed that he had not resided in Kedainiai in July and August 1941, when the mass executions took place. Petitioner also supplied the consulate officials with four false documents: a forged Lithuanian identity card, a false

² Petitioner also had received military training before the Nazi occupation, and he left Lithuanian military service with the rank of junior lieutenant in late 1939 (Pet. App. 7a).

birth certificate, a police certificate, and a certificate stating that he had been persecuted by the Gestapo. Each of these documents contained a false date and place of birth (*id.* at 7a, 118a).³ Based on the information supplied by petitioner, the consulate issued him a visa in March 1948, and he entered the United States the following month (*id.* at 3a, 120a). On a form petitioner executed the following month to gain admission into the United States, he again misrepresented the date and place of his birth (*id.* at 120a), and he repeated those misrepresentations in his application to file a petition for naturalization, in the petition itself, and during a naturalization examination, all in October 1953 (*id.* at 120a-121a). Petitioner was naturalized in 1954 (*ibid.*).

2. At trial, the government sought to establish that petitioner participated in the mass executions in Kedainiai by introducing videotaped depositions conducted in the Soviet Union of witnesses and participants who had observed the killings (Pet. App. 4a).

³ Petitioner suggests (Pet. 12 & n.6) that he falsified such facts to avoid conscription into the German Army, and not out of any intent to conceal his true identity. That claim, however, scarcely explains his decision to misrepresent his true birth place to the American consulate authorities, but not to the Nazi administration in Tuebingen. Petitioner's account also fails to explain why he initially denied making any misrepresentations. See Pet. App. 7a, 113a (finding that petitioner's stated reason for using false information was "in apparent conflict with" an earlier statement he made).

Petitioner asserts (Pet. 19) that the court of appeals misread the record in concluding that he gave his correct date of birth to Nazi authorities. In fact, the district court reached the same conclusion, finding that the records from Tuebingen "all reflect" petitioner's true place of birth and that "most" also reflect his correct date of birth (Pet. App. 117a).

The district court limited the purpose for which the depositions would be admitted. The court admitted the depositions to establish that the mass murders had occurred in Kedainiai during July and August 1941. However, the court believed that it would be unfair to admit the depositions to identify petitioner in the mass murders, because of the manner in which the depositions were taken in the Soviet Union. The court therefore refused to allow the depositions to be introduced to prove that petitioner had participated in those events (Pet. App. 86a, 108a-109a).

On the merits, the district court ruled, first, that petitioner's citizenship was not "illegally procured," within the meaning of 8 U.S.C. 1451(a) (Pet. App. 122a-124a). The court found that the government had failed to prove by clear and convincing evidence that petitioner had participated in the Kedainiai murders (*id.* at 122a-123a). Second, the district court ruled that petitioner's citizenship was not "procured by concealment of a material fact or by willful misrepresentation," within the meaning of 8 U.S.C. 1451(a). Although the court found that petitioner had made false statements in the course of obtaining his citizenship, the court held that those false statements were not "material" as that term was construed in *Chaunt v. United States*, 364 U.S. 350 (1960), and by the separate opinions in *Fedorenko v. United States*, 449 U.S. 490 (1981) (Pet. App. 124a-137a). The court determined that none of the true facts, if known, would have warranted the denial of citizenship or would have made petitioner ineligible for a visa (*id.* at 135a). In addition, the court concluded that petitioner's disclosure in his visa application of the true facts would not have prompted an investigation by the American consulate officials into

petitioner's background or the accuracy of his representations (*id.* at 136a-137a). Accordingly, the court entered judgment for petitioner.

3. The court of appeals reversed (Pet. App. 1a-37a). The court did not decide whether the depositions should have been admitted to prove that petitioner was responsible for the Kedainiai murders (*id.* at 6a & n.2), because it held that petitioner's misrepresentations were material under the standards set forth in this Court's decision in *Chaunt* (*id.* at 8a-23a, 28a-37a). Relying on the testimony of Vice-Consul Seymour Finger, who was responsible for issuing such visas and who testified about the procedures followed when petitioner applied for a visa (*id.* at 29a), the court concluded that an investigation would have been conducted into petitioner's background if he had truthfully identified his date and place of birth. That investigation, the court explained, probably would have revealed that petitioner had not been a victim of persecution. Being a victim of persecution, the court stated, was necessary to obtain the nonpreference visa that petitioner procured (*id.* at 30a-33a). The court also concluded that if petitioner's earlier misrepresentations had been revealed in the course of his naturalization proceedings, it would have resulted in "either a field investigation or an outright denial of the petition" (*id.* at 36a). In either case, the court concluded that petitioner's misrepresentations at the visa and naturalization stages were material (*id.* at 37a).

ARGUMENT

1. Petitioner concedes that he misrepresented certain facts in his visa application and in his citizenship petition, but he argues (Pet. 7-11) that the court of appeals applied the wrong standard to determine whether those misrepresentations were material under 8 U.S.C. 1451(a). That claim does not warrant review by this Court.

Section 1451(a) provides that a certificate of naturalization is invalid if it was procured, inter alia, "by concealment of a material fact." The leading case for determining whether a misrepresentation is material is *Chaunt v. United States*, 364 U.S. 350 (1960).⁴ Chaunt falsely stated in his petition for citizenship that he had never been arrested, and the government sought to revoke his citizenship. This Court held that Chaunt's falsehoods were not material, for two reasons.

First, the Court concluded that Chaunt's three prior arrests for distributing handbills, making a speech, and a breach of the peace "were not reflections on the character of the man seeking citizenship" (364 U.S. at 353). The offenses predated the five-year statutory period during which an applicant must have "behaved as a person of good moral character" to become a citizen (*ibid.* (citation omitted)). Moreover, none of Chaunt's crimes involved "moral turpitude" or "conduct which even peripherally touched types of activity which might disqualify one from citizenship." On the contrary, they were "of extremely slight consequence" (*id.* at 354). Second, the Court rejected the government's argument that

⁴ The question of the proper materiality standard was also before the Court in *Fedorenko v. United States*, 449 U.S. 490 (1981), but the Court did not reach the issue in that case.

Chaunt's falsehood denied the government the opportunity to conduct an investigation that might have revealed that Chaunt was associated with the Communist Party, which was also a disqualifying fact. The Court rejected that argument because, given the three crimes in question, the government's proposed line of investigation was "tenuous," and because Chaunt had disclosed on his petition that he was a member of an organization that the government then believed to be controlled by the Communist Party (*id.* at 355). Accordingly, the Court concluded that the government had failed to show by clear and convincing evidence "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (*ibid.*).

Petitioner contends (Pet. 9) that the appropriate formulation of the materiality standard is one that requires the government to demonstrate the existence of ultimate disqualifying facts. That argument is based on a misreading of *Chaunt*. Although the first *Chaunt* test requires the government to establish the existence of ultimate facts rendering a person ineligible for citizenship, the second test is not as exacting. Under the second test, a misrepresentation is material if the truth, while not itself a ground for the denial of citizenship, would have prompted an investigation that might have uncovered disqualifying facts.⁵ Petitioner's proposed standard would render

⁵ Indeed, by requiring the government to prove that disqualifying facts probably would have been uncovered, the court of appeals applied a standard that is more generous to petitioner than the one this Court adopted in *Chaunt*.

the second *Chaunt* standard a meaningless duplication of the first. Moreover, petitioner's standard would leave an applicant with much to gain and little to lose by lying about his background in an effort to avoid an investigation that might lead to a denial of citizenship. Not only will the passage of time make any investigation more difficult, but also in the interim the burden of proof will have shifted from the applicant to the government, which must demonstrate ineligibility in a denaturalization proceeding by clear and convincing evidence. Finally, the materiality standard petitioner suggests is inconsistent with the materiality standard that applies to other statutes, which require the government to prove only that a false statement was capable of influencing a governmental function, not that the government was in fact injured. See, e.g., *United States v. Notarantonio*, 758 F.2d 777, 785-786 (1st Cir. 1985) (collecting cases) (federal false statement statute, 18 U.S.C. 1001); *United States v. Moore*, 613 F.2d 1029, 1038 (D.C. Cir. 1979); cert. denied, 446 U.S. 954 (1980) (federal false declarations statute, 18 U.S.C. 1623); *United States v. Romanov*, 509 F.2d 26, 28 (1st Cir. 1975) (federal tax false statement statute, 26 U.S.C. 7206); *United States v. Masters*, 484 F.2d 1251, 1254 (10th Cir. 1973) (federal perjury statute, 18 U.S.C. 1621).

Petitioner also asserts (Pet. 7-11) that review by this Court is necessary to resolve a conflict among the circuits on the proper interpretation of the second *Chaunt* test. This case, however, does not require a resolution of the conflict, because this case would be decided the same way under any circuit's definition of materiality. Even under the most stringent materiality test, petitioner was not entitled to citizenship, because the record shows that his full disclosure

would have led to disqualification under the first *Chaunt* standard.

Petitioner misrepresented both his date and place of birth and his wartime residences to the American consulate officials in Stuttgart; the documentation petitioner supplied also contained misrepresentations. In his application to file a petition for naturalization, petitioner again misrepresented his date and place of birth. More importantly, he misrepresented that he had never previously given false testimony to obtain benefits under the immigration laws (Pet. App. 120a). Petitioner also misrepresented his date and place of birth in his petition for naturalization.⁶ And at his naturalization examination, petitioner misrepresented that the contents of his application and petition were true (*id.* at 120a-121a).

These misrepresentations would have led to petitioner's disqualification. Vice-Consul Finger testified that any visa application would have been denied if the applicant lied concerning his wartime residences (C.A. App. 752) and would "routine[ly]" have been denied had there been a showing that the applicant "lied about his date and place of birth to the United States officials, but had, prior to making application, told German officials in another part of the country the truth regarding these matters" (*id.* at 753). Judge Julius Goldberg, the immigration judge who served as petitioner's naturalization examiner, testified that he would have recommended against petitioner's naturalization or would have directed an investigation if he had known that petitioner had sworn

⁶ Petitioner's claim that a number of applicants lacked "authentic birth certificates" (Pet. 17) ignores the crucial distinction between persons lacking *authentic* documents and those tendering *forged* documents.

to those falsehoods (Pet. App. 36a). Thus, petitioner's statement in his naturalization application that he had not previously given false testimony to obtain immigration benefits was both manifestly false and material, because it served to conceal petitioner's pattern of lying to American officials from the outset of his efforts to emigrate to this country. That is not to say that each separate false statement made by petitioner was necessarily material simply because it showed that petitioner had misrepresented the truth. Rather, the representation that he had not previously lied to consulate and immigration officials was material because it concealed a pattern of sworn falsehoods throughout the visa and naturalization process that the evidence at trial established would have led to denial of petitioner's naturalization.⁷

In any event, the conflict among the circuits alleged by petitioner is more apparent than real. Most of the decisions cited by petitioner apply either the same standard adopted by the court of appeals here or a standard that is more favorable to the government.⁸

⁷ Although both courts below concluded that the government did not satisfy the first *Chaunt* standard, neither court discussed the above testimony by Vice-Consul Finger, and the district court totally overlooked the testimony of petitioner's naturalization examiner.

⁸ Compare Pet. App. 22a (materiality is established when the disclosure of concealed information probably would have led to the discovery of facts warranting the denial of citizenship) and *Maikovskis v. INS*, 773 F.2d 435, 442 (2d Cir. 1985), cert. denied, No. 85-1483 (June 16, 1986) (same), with *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984) (materiality is established when the disclosure of concealed information might have led to the discovery of facts warranting the denial of citizenship); *United States v. Fedorenko*, 597 F.2d 946, 947, 951 (5th Cir.

To be sure, the Tenth Circuit in *United States v. Sheshtawy*, 714 F.2d 1038 (1983), stated that the government must satisfy the more stringent standard that petitioner proposes here. In that case, however, the government could not have sustained its burden under the most lenient standard followed by other courts of appeals, since the government did not reasonably identify what disqualifying facts an investigation might have revealed.⁹ Since this Court's decision in *Chaunt* does not allow the government to engage in such unfocused speculation (see 364 U.S. at 354-355), the Tenth Circuit's decision to adopt a more stringent standard of materiality was unnecessary to its decision. Similarly, although the Ninth Circuit in *La Madrid-Peraza v. INS*, 492 F.2d 1297 (1974),

1979), aff'd on other grounds, 449 U.S. 490 (1981) (same); *Kassab v. INS*, 364 F.2d 806, 807 (6th Cir. 1966) (same); and *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961) (same). Petitioner also alleges that the Third Circuit's decision here conflicts with that court's earlier decisions, but that claim is for the Third Circuit, not this Court, to resolve.

⁹ In *Sheshtawy*, the alien was arrested for concealing stolen property three weeks before a rescheduled naturalization hearing. Shortly thereafter, the alien stated on a standard INS form questionnaire that he had never been arrested. The state charges against the alien were dismissed at a preliminary hearing shortly after he was naturalized, on the ground that no crime had been committed. The government did not claim that the arrest itself would have warranted the denial of citizenship; as far as the court's opinion discloses, the government also did not argue that the falsehood itself would have led to the denial of citizenship, or identify what facts might have been revealed by an investigation. 714 F.2d at 1039-1040. Under those facts, which more closely resemble the facts of *Chaunt* than the facts of this case, the court's judgment would have been the same regardless of the standard of materiality the court selected.

and *United States v. Rossi*, 299 F.2d 650 (1962), stated that the government must satisfy the higher standard of materiality that petitioner proposes, those were cases in which the first *Chaunt* standard was relevant, rather than the second, since the government did not allege in either case that it would (or could) have carried out an investigation into the alien's bona fides.¹⁰ Accordingly, the stricter standard articulated by the Ninth and Tenth Circuits was not necessary to the outcomes in those cases. We therefore submit that it is appropriate for this Court to await further consideration of the issue in those circuits before undertaking to resolve the conflict over the proper interpretation of the materiality requirement in *Chaunt*.

2. Petitioner also contends (Pet. 14-27) that the court of appeals disregarded Fed. R. Civ. P. 52(a) when it concluded that his disclosure of the true

¹⁰ In *La Madrid-Peraza*, the alien falsely overstated the wages she was to receive from employment as a live-in domestic, but the court of appeals reversed her deportation order on the ground that the government failed to prove that the wages the alien actually received were below the prevailing wage rates in the Los Angeles area for such employment. 492 F.2d at 1298. In *Rossi* the defendant (an Italian) posed as his brother (a Chilean) to avoid an immigration quota. The court of appeals refused to order his naturalization certificate revoked because the government failed to prove that there was in fact an immigration quota that would have barred the defendant's entry. 299 F.2d at 653-654. In neither case did the government argue that a further investigation would have disclosed disqualifying facts; rather, the government's argument was essentially that the falsehood itself was disqualifying. That type of argument rests on the first *Chaunt* test, not the second. Accordingly, neither decision involved the type of misrepresentation that is at issue in this case.

facts in his visa application would have led to an investigation.¹¹ That fact-bound claim does not merit review by this Court. In any event, the record conclusively shows that an investigation would have been conducted. As noted above, former Vice-Consul Finger and Judge Goldberg testified that misrepresentations like those made by petitioner would have triggered an investigation (Pet. App. 36a-37a). The district court erred by focusing on the facts contained in a truthful answer by petitioner, rather than on the fact that a truthful answer at any stage of the immigration and naturalization process would have shown that the documentation petitioner had previously supplied as well as his previous representations contained falsehoods. Because the district court's legal analysis was flawed, and because the evidence was clear that an investigation would have been performed if petitioner's falsehoods had come to light, the court of appeals did not err by itself concluding that petitioner's misrepresentations would have prompted an investigation (see *Pullman-Standard v.*

¹¹ Petitioner errs in asserting (Pet. 24) that the court of appeals relied on a basis for denaturalization not contained in the government's complaint, in violation of *Schneiderman v. United States*, 320 U.S. 118 (1943). There, the government alleged that the defendant had illegally obtained citizenship by failing to behave in a manner demonstrating allegiance to the Constitution for the statutory period (*id.* at 121). Given that allegation, this Court refused to allow the government also to claim that denaturalization was appropriate because the oath of allegiance taken by the defendant was false (*id.* at 159-160). By contrast, here the complaint alleged that petitioner obtained his citizenship through misrepresentations, such as those relating to his date and place of birth (see Pet. App. 122a-124a).

Swint, 456 U.S. 273, 292 (1982) (when “findings are infirm because of an erroneous view of the law,” but “the record permits only one resolution of the factual issue,” a remand is unnecessary)).

Petitioner also argues (Pet. 16-18) that the court of appeals was wrong in concluding that he would have been denied a visa if it had been discovered that he was not a victim of persecution, as he claimed. In fact, however, the testimony of Vice-Consul Finger squarely supports the court of appeals’ conclusion on this issue. As Vice-Consul Finger explained, the certificate that petitioner submitted stating that he was persecuted by the Gestapo was “[v]ery significant, because the policy under which we operated emphasized that visas would be granted to persons otherwise eligible who are victims of Nazi persecution” (C.A. App. 748). See also *id.* at 736, 738-739, 766 (“the policy was to issue visas to those who had been persecuted by the Nazis”), 767 (“at that time, January, 1947, those were the only two categories [to receive visas], either first preference visas or victims of persecution”), 768, 770-771, 781-782, 788. Petitioner’s argument that the vice-consul should be disbelieved ignores this Court’s admonition that “uncontroverted testimony” about how the immigration laws were interpreted in such circumstances by the officials who administered them is entitled to weight (*Fedorenko*, 449 U.S. at 511). Moreover, in assessing the likelihood that an investigation would have revealed that petitioner was not a victim of persecution, it was reasonable for the court of appeals to conclude that a victim of persecution would not have received an unrestricted permit to live in Germany in 1944, and that his spouse would not have openly applied for permission to practice dentistry. The court of

appeals' determinations are therefore fully consistent with Rule 52(a), and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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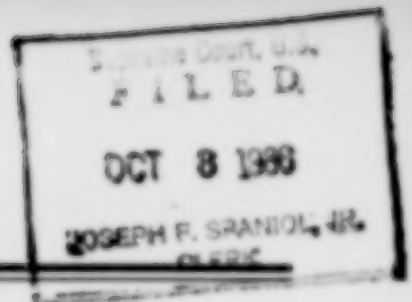
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OCTOBER 1986

(3)
No. 86-228



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF AND APPENDIX AMICUS CURIAE IN
SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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EDITOR'S NOTE

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ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. DID THE THIRD CIRCUIT COURT OF APPEALS MAKE IMPROPER *DE NOVO* FINDINGS OF FACT AND, ON THE BASIS OF SUCH FINDINGS, CREATE A DILUTED "PROBABILITY" STANDARD OF PROOF FOR "MATERIALITY" UNDER THE SECOND PRONG OF *CHAUNT V. UNITED STATES*, 364 U.S. 350 (1960)?

II. ARE MISREPRESENTATIONS OF DATES AND PLACES OF BIRTH ON PETITIONS FOR VISAS AND FOR NATURALIZATION "MATERIAL" UNDER THE SECOND PRONG OF *CHAUNT*?

TABLE OF CONTENTS

	PAGE
Questions presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	13
Appendix A — Report of the Repatriation Poll of Displaced Persons in UNRAA Assembly Centers in Germany for the Period 1-14 May, 1946: Analysis of Negative votes, Attachment 8, P.A.G.- 4/3.0.11.0.1.4:2	1a
Appendix B — <i>President Truman's Plan for Refugees, Department of State Immigration and Naturalization Service Monthly Review (hereinafter INS Monthly Review), Vol. III, No. 7 (Jan. 1946, pp. 254-255)</i>	25a
Appendix C — <i>Displaced Persons, by INS Commissioner Ugo Carusi, INS Monthly Review, Vol. IV, No. 5, (Nov. 1946, pp. 54-56)</i>	30a
Appendix D — <i>Displaced Persons in the United States, INS Monthly Review, Vol. V, No. 7, (Jan. 1948, @ pp. 103-105)</i>	36a

	PAGE
Appendix E — DEPT STATE BULL., Vol. XV. No. 386, Nov. 24, 1946, pp. 934- 938	44a
Appendix F — <i>The Future of Displaced Persons in Europe, Statement of Lt. Col. Jerry M. Sage.</i> DEPT STATE BULL., Vol. XVII, No. 419, July 13, 1947, pp. 86-88	51a
Appendix G — 22 C.F.R. 61.313. (i)(c) Supp. 1946	58a
Appendix H — DEPT STATE BULL. Vol. XVI, No. 401, March 9, 1947, pp. 423- 429	60a
Appendix I — UNRAA Order No. 52, <i>Eligibility For UN Assistance.</i> June 24, 1946. U.N.P.A.G.-4/4.2-82	75a
Appendix J — Constitution of the International Refugee Organization	83a

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

	PAGE
CASES:	
Chaunt v. United States, 364 U.S. 350 (1960)	2
Fedorenko v. United States, 449 U.S. 490 (1981)	9,10
Icicle Seafoods, Inc. v. Worthington, et al. 106 S.Ct. 1527 (1986)	3
Schneiderman v. United States, 320 U.S. 118 (1943)	11
United States v. Kairys, 600 F. Supp. 1254 (N.D. Ill. 1984) aff'd, 782 F.2d 1374 (7th Cir. 1986)	11
United States v. Kowalchuk, 744 F.2d. 301 (3d.Cir. 1984, publication withdrawn) 773 F.2d 488 (3d.Cir. 1985), cert. denied 106 S.Ct.1188(1986)	10
United States v. Kungys, 793 F.2d. 516 (3d.Cir. 1986)	2
STATUTES:	
8 U.S.C. section 1451(a)	2,13
Displaced Persons Act of 1948, 50 U.S.C. App. (1952 ed.) sec.1951 et seq.	5,8
8 U.S.C. 1182 (a)(19)	10
OTHER:	
Constitution of the International Refugee Organization	8,9
Federal Register, December 24, 1946:	
22 C.F.R. Sec.61.313.(a)(3) (Supp.1946)	5,7
22 C.F.R. Sec.61.329 (Supp.1946)	7

	PAGE
DEP'T STATE BULL., Vol. XVI. No.401, (March 9, 1947)	8
DEP'T STATE BULL., Vol. XVII. No.419, (July 13, 1947)	7
Immigration and Naturalization Service Monthly Review, Vol. III, No. 7 (January 1946)	5
Immigration and Naturalization Service Monthly Review, Vol. IV, No. 5, (November, 1946)	5,6
Immigration and Naturalization Service Monthly Review, Vol. V, No. 7 (January, 1948)	6,7
<i>Report of the Repatriation Poll of Displaced Persons in UNRAA Assembly Centers in Germany for the period 1-14 May, 1946: Analysis of Negative votes, Attachment 8. U.N.P.A.G.-4/3.0.11.0.1.4:2</i>	4
UNRAA Order No. 52, <i>Eligibility for UN Assistance</i> , June 24, 1946. U.N.PAG-4/4.2-82 .	8



IN THE
Supreme Court of the United States

OCTOBER TERM 1986

JUOZAS KUNGYS,

v.

Petitioner

UNITED STATES OF AMERICA,

Respondent.

**BRIEF AMICI CURIAE IN SUPPORT OF
THE PETITION OF JUOZAS KUNGYS
FOR A WRIT OF CERTIORARI**

AMICI

The UKRAINIAN AMERICAN BAR ASSOCIATION, UKRAINIAN NATIONAL ASSOCIATION, JOINT BALTIC AMERICAN NATIONAL COMMITTEE, ESTONIAN AMERICAN NATIONAL COUNCIL, LITHUANIAN AMERICAN COUNCIL, AMERICAN LATVIAN ASSOCIATION IN U.S.A., INC., AMERICANS FOR DUE PROCESS, BALTIC AMERICAN FREEDOM LEAGUE, BYELORUSSIAN AMERICAN ASSOCIATION, UKRAINIAN AMERICAN JUSTICE COMMITTEE, and THE COALITION FOR CONSTITUTIONAL JUSTICE AND SECURITY are organizations who represent or whose members include naturalized United States citizens of Ukrainian, Latvian, Lithuanian, Estonian and Byelorussian descent. Many of these persons are former refugees or displaced persons who fled from their homelands before the advancing Soviet armies towards the end of World War II, subsequently refusing to return to their homelands after the War for fear of

political persecution by the Soviets, and eventually obtaining immigration visas from United States Consulates in Germany and Austria for entry into this country.

Amici Curiae have obtained the written consents of counsel for petitioner and for respondent and pray that a writ of certiorari be granted to review the judgment of the Third Circuit Court of Appeals in *United States v. Kungys*, 793 F.2d. 516(3d Cir. 1986).

This amicus brief contains a fuller argument on the absence of any legal requirement that a refugee also had to be a victim of Nazi persecution to be eligible for a non-preference quota immigration visa, and on the incorrectness of the Third Circuit's conclusion that misrepresentations as to date and place of birth are now "material." These issues are critical to countless naturalized citizens who fled from Soviet-occupied lands. The Third Circuit's conversion of heretofore immaterial misrepresentations of date and place of birth on immigration papers under the first prong of *Chaunt v. United States*, 364 U.S. 350(1960), into "material" misrepresentations under the second prong of *Chaunt* has resulted in a revision of history based on hypothesized facts and jeopardizes the citizenship of those who cannot establish that they were victims of Nazi persecution.

STATUTE

The federal statute involved in Section 340(a) of the Immigration and Nationality Act of 1952, as amended, (8 U.S.C. 1451(a)), which provides in pertinent part for revocation of naturalized citizenship "procured by concealment of a material fact or by willful misrepresentation."

STATEMENT OF THE CASE

The Third Circuit Court of Appeals in the instant case made *de novo* findings of fact that the holding of a German

residency permit "without special restrictions" by a Lithuanian refugee who had fled from the advancing Soviet front and who had obtained such permit from the German civil authorities in the Third Reich shortly before the end of the war, "tended" to show that he was not a victim of Nazi persecution. Applying a "probability" test to the second prong of *Chaunt*, the Third Circuit concluded he was thus ineligible to receive a non-preference, quota immigration visa, which the Court further found could have been issued only to victims of Nazi persecution.

The Third Circuit ignored the finding of the District Court which rejected as "in error" the testimony of Seymour Maxwell Finger, a former career Foreign Service Officer who had testified that at the time petitioner applied for his visa, only victims of Nazi persecution were issued non-preference, quota immigration visas. Mr. Finger contended that the Nazi persecutee requirement was contemporary immigration policy embodied in a regulation or regulations, but no such regulation was produced or proffered by the government at trial. Nevertheless, the Third Circuit, ignoring the holding of this Court just two months earlier in *Icicle Seafoods, Inc. v. Worthington, et al*, 106 S. Ct. 1527(1986), that appellate courts are not to make *de novo* findings of fact in cases tried without a jury in the District Court, made its own finding of fact that such a requirement did in fact exist.

Based upon that hypothesized disqualifying fact, the Third Circuit concluded that misrepresentations or concealments by the defendant about his date and place of birth became material under the second prong of *Chaunt*. The significance to the Amici Curiae of the Third Circuit's fact finding and holding lies in the creation of a novel judicial test for proving "materiality", whereby the mere status of

not having been a victim of Nazi persecution can be construed to mean that such refugee or displaced person illegally procured his or her visa, and misrepresentations as to date and place of birth are now deemed "material" pursuant to a diluted probability standard of proof under the second prong of *Chaunt*.

It is a historical fact that thousands of Eastern Europeans, who cannot prove that they were victims of Nazi persecution, fled the advancing Soviet armies before the end of the Second World War, or refused to go back to their countries of birth or origin afterwards for fear of persecution by the Soviets. (See Appendix A: *Report of the Repatriation Poll of Displaced persons in UNRRA Assembly centers in Germany for the period 1-14 May, 1946: Analysis of Negative votes. Attachment 8. U.N. PAG-4/3.0.11.0.1.4:2*). It stands to reason that left unchallenged, the Third Circuit's decision will affect countless former refugees and displaced persons who are now subject to denaturalization proceedings for having illegally procured their visas since they were not also victims of Nazi persecution.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI:

- A. NATURALIZED CITIZENSHIP WILL BE UNDULY JEOPARDIZED BY A DILUTED "PROBABILITY" STANDARD OF PROOF FOR "MATERIALITY" UNDER THE SECOND PRONG OF *CHAUNT*, AS DEMONSTRATED BY THE THIRD CIRCUIT'S REVISION OF HISTORY BASED ON HYPOTHESIZED FACT FINDING.**

The District Court had before it in evidence (Petitioner's App. E, 140a-141a Exh D-34) the actual non-preference quota immigration visa regulations in effect

immediately after World War II, as published in the Federal Register on December 22, 1946, which provided in priority category 3(i)(c) for the issuance of non-preference visas to "Displaced persons covered by the President's Directive of December 22, 1945." 22 C.F.R. 61.313(a)(3). Those visa regulations which, were the governing law, remained in effect until the passage on June 25, 1948 of the Displaced Persons Act of 1948, 50 U.S.C. App. (1952 ed.) Sec. 1951 et seq. There is nothing in the regulations or in the Directive of President Truman included therein which interprets "displaced persons" to be coterminous with "victims of Nazi persecution." (See Petitioner's Appendix F, Page 143a).

Further evidence contrary to the findings of the Third Circuit is contained in articles published contemporaneously by the Immigration and Naturalization Service in its "Monthly Review" by then INS Commissioner Ugo Carusi. Commissioner Carusi was designated by President Truman as Chairman of an interdepartmental committee to supervise the execution of the President's Directive of December 22, 1945 so that visas would be distributed fairly among persons of all faiths, creeds and nationalities. He reported that "the major group affected by President Truman's Directive of December 22, 1945 are displaced persons and refugees who are natives of Central and Eastern Europe and the Balkans." (See Appendix B: *President Truman's Plan for Refugees*, Monthly Review, Vol. III, No. 7 (January 1946), pp. 254-255).

In March of 1946, Commissioner Carusi went to Germany with the head of the Visa Division of the State Department and other members of the interdepartmental committee and concluded that it was immediately necessary to establish categories to describe those persons who could properly be classified as displaced persons. He then described five categories of displaced persons which

included " . . . persons who feared to return to their homes because of possible religious or political persecution." (See *Appendix C: Displaced Persons*, Monthly Review, Vol. IV, No. 5 (November 1946), p. 54.) Commissioner Carusi further confirmed that "[t]he President had requested that care be exercised to assure that no one group would be favored over another nor discriminated against." *Ibid.* To have granted non-preference immigration visas *only* to victims of Nazi persecution would actually have been a violation of the law since the regulation was intended to cover all displaced persons. (See *Petitioner's Appendix E* at p. 140a).

The actual number of "displaced persons" who were admitted into the United States with quota visas under the regulation contained in 22 C.F.R. 61.313 by November 30, 1947 was 26,801 from over 40 countries. (Appendix D: *Displaced persons in the United States*, Table No. 1, Monthly Review, Vol. V, No. 7, (Jan. 1948) p.104).

A Special Subcommittee on Foreign Affairs reported that there were three principal groups of "displaced persons":

"(1) the liberated forced-labor group who were brought into Germany from Poland, Yugoslavia and the Ukraine; (2) the Baltic group, those who fled from the Baltic States ahead of the armies in 1944 (the Balts include Latvians, Lithuanians, and Estonians); and (3) the Jewish displaced persons, most of whom come from the Eastern European countries." *Id* at p. 103 and *Displaced Persons and the International Refugee Organization: Report of a Special Subcommittee on Foreign Affairs*, 80th Congress, First Session, p.2. Washington 1947. (Appendix D, f.n.2, p. 103)

Despite this plethora of accessible historical facts, showing the wide scope of eligibility of displaced persons for non-preference quota immigration visas under the regulations and the Truman Directive included therein, the Third Circuit ignored the regulations and casually devoted a mere footnote to its misreading of the President's Directive of December 22, 1945 as speaking "only in general terms concerning the need to resettle displaced persons and particularly orphaned children." (F.N.10, Petitioner's App. A, 33a). In fact the median age of the 28,789 displaced persons admitted under the regulations was 31.9 years, with only 6,961 immigrants being under 21 years old. (*Displaced Persons in the United States*, *id.* at p. 104).

Instead, the Third Circuit relied on the blatantly erroneous and totally unsubstantiated testimony of Seymour Finger and came up with a revision of history. (See Appendix E: Dept. of State Bulletin, Vol. XV; No. 386, Nov. 24, 1946 at pg. 935; *see also* Appendix F: Dept. of State Bulletin Vol. XVII, No. 419, July 13, 1947 at pp. 86-88).

Interestingly, the Court of Appeals cites 22 C.F.R. sec. 61.329 (supp. 1946), yet fails to cite 22 C.F.R. sec. 61.313 (supp. 1946), (Appendix G), which is found in the very *same* volume as 22 C.F.R. 61.329, and which places in the *first* priority nonpreference class of quota immigrants the following: "Displaced Persons covered by the President's directive of Dec. 22, 1945 and his directive of Oct. 31, 1946." *ibid.* Such selective citation is not only legally unacceptable, but also has resulted in a judicial ruling that threatens the naturalized citizenship of thousands. An overview of President Truman's position as to displaced persons can be found in Appendix H: Dep't State Bull. Vol. XVI No. 401, March 9, 1947, pp. 423-429.

A brief review of documentation relating to two United Nations agencies created to deal with refugee problems for

which the United States provided funding sheds further light on the definitions of "refugees" and "displaced persons." Appendix I, dated June 24, 1946, is taken from United Nations Archives dealing with the United Nations Relief and Rehabilitation Administration ("UNRRA"), and is known as "Order No. 52, Eligibility for UNRRA Assistance." (U.N.PAG-4/4.2-82). It clearly spells out the fact that among eligible persons were those "who were displaced as a result of the War from their country of origin, citizenship, or previous residence" during the time period Sept. 1, 1939 until the cessation of hostilities.

On July 1, 1947, the International Refugee Organization (IRO) rules and regulations superceded and replaced the prior UNRRA rules. UNRRA and IRO were the two United Nations-formed agencies dealing with refugees and persons displaced by the Second World War. Under either the UNRRA or IRO standards petitioner was *prima facie* eligible for assistance, as were thousands of Eastern Europeans fleeing from and refusing to return to the Soviet-occupied territories. It is critical to note that neither the UNRRA nor IRO standards (nor, for that matter, the Displaced Persons Act, *supra*, which relied upon the IRO Constitution for its eligibility criteria) made Nazi persecution the sole determinant of eligibility. As an example of those stated to be *prima facie* eligible were residents of the Baltic countries (other than German Balts) as well as residents of Poland, the USSR, the Ukrainian and Byelorussian SSRs.

Appendix J, the IRO Constitution, lists two eligible classes of persons, refugees and displaced persons. Among the classes of refugees, persecutees were only two of six eligible categories, even under the most liberal reading of the list. (Annex I, Part I, Section A, 1-4.) Eligible refugees were also defined in Section A, para. 2 as those who, other than displaced persons, were outside their country and who,

as a result of events subsequent to the outbreak of the War were unable or unwilling to return to their country. Nothing is mentioned about persecution as a criterion of eligibility.

The conditions of IRO Eligibility are found in Section C, and give a choice of repatriation or of going elsewhere if the refugee or displaced person had "valid objections" to repatriation. These conditions clearly applied to persons other than the victims of Nazi persecution.

Thus, there was no historical or regulatory basis for Mr. Finger to have testified at trial that only Nazi persecutees were issued non-preference visas. His testimony was at best disingenuous, and at worst a blatant revision of history. Cloaked now in judicial pronouncement as the law within the Third Circuit, it calls into question the visa eligibility of thousands of Eastern Europeans who satisfied the actual eligibility criteria of the time, but not the Nazi persecutee standard devised by the Third Circuit Court of Appeals. This case demonstrates the improper use of hypothesized facts warned against by Justice Blackmun in his concurring opinion in *Fedorenko v. United States*, 449 U.S. 490 (1981) and begs for a clarification of the second prong of *Chaunt*.

B. THE THIRD CIRCUIT'S HOLDING THAT MISREPRESENTATIONS AS TO DATES AND PLACES OF BIRTH IN VISA AND NATURALIZATION PETITIONS ARE "MATERIAL" UNDER THE SECOND PRONG OF CHAUNT IS INCONSISTENT WITH PRIOR HOLDINGS, EVEN WITHIN THE THIRD CIRCUIT, AND WITH PRIOR ENFORCEMENT POLICY OF THE DEPARTMENT OF JUSTICE.

On the few occasions that courts have addressed even peripherally the question of the materiality of incorrect dates and places of birth in immigration papers, the courts have determined such misstatements to be immaterial.

In *United States vs. Kowalchuk*, 744 F.2d 301 (3d Cir. 1984) (publication withdrawn), even the dissenting judge on the Third Circuit panel which had initially ruled in favor of the defendant acknowledged that:

" . . . misrepresentations having no bearing on the issues involved such as place of birth or personal data statements often made under duress to avoid repatriation, should not serve as a basis for exclusion . . .

. . . These are inconsequential nondisclosures that Congress and the courts have chosen to absolve".

Judge Rosenn's dissent went on to cite this Court's opinion in *Fedorenko vs. United States*, *supra*, and the legislative history of the Immigration and Nationality Act of 1952, 212(a)(10), 8 USC 1182(a)(19) (1982) as authority for the immateriality of incorrect dates and places of birth on immigration papers.

In *United States v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), aff'd 782 F.2d 1374 (7th Cir. 1986), the Government sought to revoke the defendant's citizenship partly on the grounds that he had provided a false birthdate and false place of birth in his visa and naturalization papers. The trial judge concluded that he " . . . is persuaded that the false information was wilfully represented by defendant. It is, however, not material as that term has come to be defined." (600 F. Supp. at p. 1267). While the court went on to acknowledge that the meaning of the *Chaunt* standards remains unclear, and that the circuits are divided on this issue, and further that the Seventh Circuit had yet to rule on the issue, it left no doubt that, at least as far as the trial court was concerned, false information as to date of birth and place of birth is not material.

In a revealing footnote, the court wondered how denaturalization based upon the possibility that the disclosure of non-disqualifying facts years earlier could conceivably have led to the discovery of disqualifying facts squares with the Supreme Court's express recognition in *Schneiderman v. United States*, 320 U.S. 118 (1943) that denaturalization, in which the government "seeks to turn the clock back" is significantly different from the original naturalization. (600 F. Supp. at p. 1265). As the Court in *Schneiderman* concluded, citizenship once granted is a right which should not be taken away without the clearest of justification and proof. The trial court in *Kairys* recognized that a higher burden of proof is required when the priceless status of citizenship is being revoked and was properly concerned that retroactive reliance upon previously non-material facts in denaturalization proceedings so as to now make such facts material might be contrary to the *Schneiderman* requirement of a higher standard of proof.

Not only the courts, but also the Justice Department has recognized that misstatements as to date and place of birth are immaterial and should not be the basis for denaturalization proceedings. Allan A. Ryan, Jr., (a former Director of the Office of Special Investigations of the United States Justice Department, a former attorney with the Office of Solicitor General, and a former law clerk to a Justice of the Supreme Court) recognized the reality that numerous refugees from the Soviet front lacked authentic proof of birth, or had misrepresented their dates and/or places of birth, and publicly assured such persons that their citizenship was not in jeopardy. In his speech to the Ukrainian American Bar Association on October 30, 1982, in East Hanover, N.J., Director Ryan promised:

"Many immigrants, otherwise innocent of wrongdoing, gave false dates of birth or false places of birth when they applied for a visa. Are they subject to prosecution? The answer is No." (Address of Allan A. Ryan, Jr., Director, Office of Special Investigations, to Ukrainian American Bar Association, East Hanover, N.J., (October 30, 1982)).

Unfortunately, the Third Circuit has now provided an unsound basis for denaturalizing citizens by retroactively converting immaterial misrepresentations as to dates and places of birth into "material" misrepresentations for those who do not have the status of or cannot prove that they were victims of Nazi persecution.

CONCLUSION

For the aforementioned reasons, it is imperative that the Supreme Court reverse the Third Circuits's holding which implies that inability to establish that one was a victim of Nazi persecution means that an individual had illegally procured his citizenship, and clarify that misrepresentations as to date and place of birth in immigration papers are not "material" within the meaning and intent of Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1451(a).

Respectfully submitted,

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Date: October 7, 1986



APPENDIX A

**REPORT OF THE REPATRIATION POLL
OF DISPLACED PERSONS
IN UNRRA ASSEMBLY CENTERS IN GERMANY
FOR THE PERIOD 1-14 MAY, 1946:
ANALYSIS OF NEGATIVE VOTES,
ATTACHMENT 8 P.A.G. — 4/3.0.11.0.1.4:2
Why the Displaced Persons Refuse To Go Home**

**GERMANY
MAY 1946**

ATTACHMENT 8

The following analysis of reasons why approximately 82% of the displaced persons voted not to return home is based solely on their own statements and on summary analyses prepared by the town directors, who, through daily contact with the DPs are best fitted to analyse their present position with regard to repatriation.¹ Observations contained herein should in no way be construed as representing the views of the UNRRA staff in Germany. They are the views of the private individuals in the centers, and are

¹ After following a policy of encouraging outright repatriation of "former Soviet nationals" and others whose homelands came under Soviet control after 1945, the United Nations Relief and Rehabilitation Administration (UNRAA) found that about one million displaced persons (DPs) under its care refused to be repatriated. Approximately fifty-two nationalities were among these DPs, and they were dispersed among 920 camps in Germany, Austria, and Italy. Not fully understanding their reluctance, UNRRA officials in the U.S. Zone of Occupied Germany decided to conduct a secret poll among the DPs, during 1-14 May 1946. Each DP was handed a sheet and asked to answer the following questions: (1) what nationality do you claim?; (2) do you wish to be repatriated now? (yes/no); (3) if your answer to 2 is "no," explain your reasons in the space below.

included for the purpose of presenting a comprehensive picture of the group motives, personal motives and repatriation desires of the displaced persons.

Due to the tremendous number of ballots received and the variety of replies in a multitude of languages, it has been impossible to make an accurate numerical calculation of the different reasons. The percentages quoted in this report are therefore based on the most reliable estimates available.

It is interesting to note that nationals of so-called Western countries give both personal and economic reasons for not going home now, while the Eastern Europeans generally fall back on political factors as their primary explanation. The Eastern Europeans seem to show a real fear in their replies, the fear increasing the further east the home of the voter. Nevertheless, there is reason to believe that, among many of these people, the political explanation serves merely as a convenient justification and cover for underlying motives which are essentially personal and economic. Camp directors throughout Germany point to a general impression of demoralization and inertia among the Poles particularly, a reluctance to leave a comparatively secure and comfortable existence for a life of toil and hardship in their war-torn country.

Annex "A" contains some typical replies from the principal nationalities.

No exact figures on the total number of respondents were given by UNRRA, but the poll gave UNRRA and the U.S. military authorities their first comprehensive understanding of the difficulties involved in repatriation. Although some facts and analyses in the report are inaccurate and misleading, the document does shed light on why DPs did not want to return home after the war. (Ed.)

Estonians, Latvians, and Lithuanians²

The displaced persons from the Baltic countries of Estonia, Latvia, and Lithuania submitted an almost unanimous vote against repatriation. They can be considered as a single group, since their backgrounds are similar and all of their replies express the same unwavering determination not to return to their homelands as long as they are occupied by the Russians.

The principal groups among the Balts come from the so-called "middle" and "upper-middle" classes. Many are well educated and enjoyed the prosperous, independent life of the average intellectual, professional or businessman before the war. Others were independent farmers, small artisans or craftsmen. They started coming into Germany in large numbers in 1941-42, when the Germans first occupied the Baltic lands. It is difficult to determine how many of them came voluntarily, seeking better jobs, and how many

² Granted sovereignty in 1919, the Baltic states of Estonia, Latvia, and Lithuania were included in a plan secretly arranged by Nazi Germany and the USSR for dividing these states into spheres of influence. In the secret protocol of the Nazi-Soviet Pact, 23 August 1939, Finland, Estonia, and Latvia were ceded to the Soviets. By the Nazi-Soviet friendship treaty, 28 September 1939, Lithuania was similarly brought under Soviet domination. Profiting from the German advance of May-June 1940 on the Western front, Soviet troops overran all the Baltic states, including the Lithuanian border strip reserved for Germany by the friendship treaty. On 15 June 1940 Soviet forces entered Lithuania, and two days later they were in Latvia and Estonia. In August 1940 the USSR officially incorporated these states into the USSR as the fourteenth, fifteenth, and sixteenth Soviet republics.

After the German invasion of the USSR, the three countries, together with part of Belorussia, constituted the *Reichskommissariat Ostland*, under the direction of *Gauleiter* Heinrich Lohse, and were deprived of their autonomy. With the end of the war, attempts to reconstitute independent governments failed and the Red Army restored the political situation of 1940. By 1946 there were an estimated 190,400 Balts under UNRRA care. (Ed.)

were actually deported to Germany. It is significant, however, that very few of this group were persecuted by the Nazis, and that practically none of them have returned home. The bulk of the "displaced" Balts, however, appear definitely to have entered Germany in late 1944, fleeing, not from the enemy, but from the Russians.

Their primary objection to repatriation is based on political reasons. Approximately 90-95% of them express an outspoken antagonism toward "Communism as a way of life" and especially toward "the Russian occupation of their countries." (It is interesting to note that some of the answers were anti-communistic as opposed to anti-Russian, but the majority made no distinction between the two.) Most of their reasons are not a mere parrot-like repetition of political propaganda which characterizes the Polish vote, but arguments apparently based on personal experience during the Russian occupation of 1940/1 when relatives and friends were "transported to Siberia in sealed cars without food or water, never to be heard of again." They express the fear that the same may happen to them if they return. Some refer to the time the Communist party was voted into power in a "free election," held after all the parties but one were dissolved, in which everyone was forced to vote.

The actual replies on the ballots vary from a guarded "our country is occupied" to ferocious denunciations of "Russian dictatorship." Such words as "sadism," "reign of terror," "bestial," "murderous" etc. appear frequently in the descriptions of Communism. A few quoted Molotov's statement made in 1940 to the effect that the Baltic nations must be destroyed. About 30-40% of the Baltic DPs state that they have lost relatives or friends, either killed or deported by the Russians. There is no way of telling whether or not this figure is accurate, but their reasons for not desiring repatriation seem to be motivated by a real fear of

personal persecution, deportation or even death at the hands of the Russian secret police.

Closely linked with the political reasons for not desiring repatriation are the economic ones. These were mentioned by approximately 60% of the Balts, usually as a secondary factor, in connection with the communistic regime. Only about 10% based their primary reason for not returning on economic factors. A large number of these DPs were accustomed to a fairly high standard of living before the war. "The confiscation of all private property" has reduced many formerly well-to-do Balts to a position where they could not hope to return to their previous way of life. A number of the Baltic farmers, particularly Lithuanians, claim to have had their land taken away from them during the Russian occupation and were forced to join "Kolchozes" [kolkhozy] or farming communities. They now refuse to return. The uncertainty of being able to buy food at normal prices, the shortage of houses, the prospect of unemployment and the unfavorable currency exchange, all vital problems to the Poles, seem to be relatively insignificant factors contributing to the anti-repatriation desires of the Balts, who for the most part have not considered repatriation seriously enough to think about these problems.

In addition to the fear of economic persecution, the fear of religious persecution is also mentioned as a secondary reason for not wanting to go home. Some mention the days in 1940/1 when they "weren't allowed to go to church"; some fear reprisals for their former membership in religious organizations, while others merely state that "in my country today religion is suppressed and the institution of marriage does not exist."

The majority of the Balts sincerely want to return, provided they can return to a "free, democratic country." Some of them are optimistic enough to state that they

"expect" to go home as soon as a democratic government is established. A group of Latvians and Lithuanians in one camp have reluctantly accepted the present situation in their former countries as final and are hoping to immigrate to either the U.S., Canada or Africa. However, the majority of Balts seem to be waiting in Germany for the "occupation" of their countries to end, for there is very little mention of resettlement as a solution to the Baltic "hard-core" problem.³

Poles⁴

With very few exceptions, the Poles in the U.S. and British Zones gave political reasons for their negative votes in the repatriation poll. The three basic complaints, repeated again and again, were the "presence of Russians in Poland," "the Communistic Warsaw government," and "the lack of personal freedom in Poland." Although most of the Poles claimed the same reasons for not wanting to go home, it is clear from the comments on their ballots that they did

³ These were persons considered to be non-repatriable, either because they were unacceptable to their country of origin or were unwilling to be repatriated. (Ed.)

⁴ On 1 September 1939 Poland was invaded by Germany and on 17 September by the Soviet Union. Polish army units were soon forced to surrender to the Germans or the Red Army. According to the 28 September 1939 agreement between Ribbentrop and Molotov, Poland was divided along the Narva-Bug-San rivers; that is, approximately along the Curzon Line (see note 7). In the German sphere, some territories were incorporated directly into the Reich, and the central part of the country was organized under the General Government of Occupied Poland.

On 7 May 1945, the day the Germans capitulated, Poland was split between a Polish government recognized by the Western Allies and a Polish Committee of National Liberation recognized by the USSR. A solution of sorts was worked out with the creation of the Provisional Government of National Unity in Moscow in June 1945. On 5 July 1945 the major Western powers withdrew recognition of the London-based Polish government-in-exile. (Ed.)

not all have the same motivation for their answers. In general, the Poles who quoted political reasons can be broken down into three groups.

The first and smallest of these groups is made up of those so-called leaders and intellectuals who have an ideological conception of Poland as a "free democracy" and refuse to return under present conditions. They claim to abhor the thought of "Communism" in Poland, the "Russian-dominated Warsaw government," the "occupation by Russian troops," the alleged repression of democratic freedom, and feel that they can do more for their fatherland by not returning now. A few described the conditions under which they would return: "When the Atlantic Charter is applied;" "When the Russians leave;" "When General Anders returns;"⁵ "When Democracy has been established

⁵ The Atlantic Charter was a statement of fundamental principles for the postwar world order, issued jointly by Roosevelt and Churchill after meetings during 9-12 August 1941 in Argentia Bay, Newfoundland. The main terms were: (1) a renunciation of territorial or other aggrandizement by the United Kingdom and the United States; (2) opposition to territorial changes contrary to the wishes of the people immediately concerned; (3) support for the right of peoples to choose their own form of government. On 15 September 1941 it was announced that fifteen nations fighting the Germans and Italians (including the USSR) had endorsed the Atlantic Charter. Stalin, however, added a proviso: "Considering that the practical application of these principles will necessarily adapt itself to the circumstances, needs, and historic peculiarities of particular countries, the Soviet Government can state that a consistent application of these principles will secure the most energetic support on the part of the government and peoples of the Soviet Union." (Ed.)

⁶ Wladyslaw Anders (1892-1970), a Polish Army commander, was wounded and captured by the Soviets in September 1939 and released in July 1941. He then formed an army of 75,000 citizens of Poland (including non-Poles) who fought on the British side in the Near East and participated in the capture of Monte Cassino in May 1944 and of Bologna in April 1945. Anders was politically allied to the Polish government-in-exile based in London and headed by General Sikorski. (Ed.)

as in England." Some feel that since they have not returned home before now, they will be suspected and possibly persecuted regardless of their innocence of collaboration. This first group is the only one which mentions terroristic treatment by Russians and fear of reprisals should they return. On the whole the fear of persecution does not play the same important role in the Polish answers as it does in those of the Balts, the Russians and the Polish-Ukrainians.

The second group consists of people who have private political reasons for fearing repatriation. The largest number in this group are those whose homes were located east of the Curzon line in that part of Poland which has been annexed to Russia.⁷ The loss of their homes to Russia makes them feel an even stronger nationalistic tie with Poland, so that they invariably refuse to return to their homes and become Soviet citizens. If any of them would agree to go back to Poland they would probably be sent to the newly annexed western provinces which are now being settled by the Poles.⁸ This cannot properly be called repatriation, but

⁷ The Curzon Line refers to a proposal to settle the disputed frontier between Poland and Russia, put to the Poles by Lloyd George, the British Prime Minister, on 10 July 1920, and then dealt with by Lord George N. Curzon, the British Foreign Secretary. The line or demarcation stretched from Grodno, through Brest-Litovsk and Przemyśl, to the Carpathians; it would have excluded from Poland the lands inhabited predominantly by Belorussians, Ukrainians, and Lithuanians. The Poles rejected the proposal and subsequently secured territory twice as large as that suggested by Lloyd George. After the Nazi-Soviet Pact of 1939, the Curzon Line (with minor variations) became the boundary between the German and Soviet spheres of occupation. In 1945 it was accepted by the Polish Government as the frontier with the USSR. (Ed.)

⁸ At the Potsdam conference of 17 July-2 August 1945, the Allies agreed that Poland would occupy the German areas east of a line following the Oder and Neisse rivers, from the Baltic Sea to the Czechoslovak frontier. Former eastern territories of interwar Poland were taken by the USSR, and about 1.4 million Poles left this territory in 1946-7 to settle in regions taken from the Reich. (Ed.)

rather "pioneering" in an unfamiliar land, far from friends and relatives. Most of the DPs now being maintained in camps in Germany seem to lack a pioneering spirit to set forth and build a new home and a new life in an area where conditions are reported to be difficult.

The third and by far the largest group of the so-called political refugees (estimated roughly at about 60% of the total negative vote), are those who cannot definitely make up their minds to return. It must be remembered that the majority of these people have had little or no education to speak of, have not suffered political persecution which would shape their ideology, and are incapable of forming mature political opinions for themselves. They are subject to outside influences and as a result, their minds change almost every day, reflecting current slogans circulating in the camps. It is among this group that you find the stereotyped answers, such as "Poland is not free," "the Russians are occupying Poland," and "Poland is Communistic," indicating that the voters have been propagandized, either in the past, or that there was a planned campaign on the part of their leaders to furnish the DPs with the same answers for the poll. The vote of this group should not be taken as a final indication of their desires. Most of them are agricultural workers, small independent farmers and factory hands who have a strong patriotic feeling for Poland, regardless of her political complexion. The team directors who commented on this group felt that most of them would eventually return to Poland if given a little more encouragement and if removed from the political influences hindering their repatriation.

The influences which are affecting the majority of those potentially repatriable Poles seem to be similar in all of the camps, and are centered around the camp leaders, who were elected by a free vote, the members of the Polish guard units

and the Catholic clergy.⁹ These political and clerical leaders have been successful in persuading a large number of Poles that it is against their interests to return home until their country is "freed from the Russians." The Polish-Ukrainians who are unanimously opposed to repatriation have also had an effect on the other Poles, as well as the demoralized group who have lost all ambition and are content to stay in the camps, leading a comparatively comfortable life, until forced to make a decision. Three other factors which have recently had an unfavorable effect on the Poles' desire to be repatriated are Hoover's speech describing starvation in Poland, Churchill's "iron curtain" speech and the dissension at the foreign ministers' conference at Paris.¹⁰

Over half of the Poles quoted economic factors as a secondary reason for not wanting to go home. These factors are probably more basic than the political ones in determining repatriation desires of the Polish DPs. The Poles in Germany are not entirely cut off from their homeland. They

⁹ The term Polish guard units refers to displaced persons recruited to guard American supply depots and other installations. (Ed.)

¹⁰ On 9 February 1946 Stalin gave a speech in which he argued that, despite the end of hostilities, there was to be continued vigilance; there was to be no peace at home or abroad. Churchill delivered the Western reply at Fulton, Missouri on 5 March 1946. He argued for close co-operation among the world's English-speaking peoples, because "from Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the continent," allowing "police governments" to rule Eastern Europe. The month of March 1946 is seen by many historians as the beginning of the Cold War.

At the Paris conference of Allied foreign ministers in May 1946, the USSR accused the United Kingdom of imperialism for its suppression of the Greek rebellion and criticized the Netherlands for its repressive actions in Indonesia. The British foreign minister, Ernest Bevin, responded by accusing the Soviet Union of imperialism. These disputes prevented any agreement from being reached at the conference. (Ed.)

maintain contact through newspapers, letters, radio broadcasts and friends who have returned to Germany after having been repatriated. From these sources they receive a description of destruction in the towns and cities, shortages of food, clothes and housing, unemployment and the general economic insecurity of life in present-day Poland.

These Poles who believe they have lost all of their former possessions naturally hesitate to return to their war-torn country where they fear they cannot earn a living. Their feeling of economic insecurity is expressed in the following typical comment by a Polish farmer: "At my house now, no horse, no cow, no pig — only a picture of Stalin on the wall." The desire to remain in their present condition of comparative security is quite natural on the part of these people, who were suddenly taken from a state of slavery and placed into an artificial society where they are cared for without having to work. Many of them who could not maintain the same standards of living at home will continue to live in the assembly centers as long as they exist.

Many of the Poles have not been content to live idly, however, but have found some measure of real economic security in the form of employment. This is particularly true in the French Zone where a large number of DPs live and work in the German communities. The fact that a large percentage of Polish DPs are employed in the local economy in the French Zone is reflected in the ballot, for only 64% gave political reasons, the rest economic or personal reasons for wanting to stay in Germany.

Very few of the Poles gave only personal reasons for not wanting to go home. Among those who did are the people who have lost their homes, their families and their friends as a result of the war and have nothing to which to return. They don't appear to have the courage to face the future alone in a destroyed country, and many of them want to start life anew

in a western land, preferably the U.S. or Canada. They are waiting hopefully for a declaration of emigration opportunities by the governments of these countries. Another group of DPs have family ties which are holding them here. They are engaged or married to Germans, to DPs of another nationality or to members of the Polish Guard Units stationed in Germany and are unwilling to break up their families to return home. Others can't be repatriated now for health reasons. Either they are old or sick or are staying with sick relatives, until they can be moved. Some mothers don't want to expose their infants and small children to the uncertain conditions in Poland, but prefer to remain in Germany until after the harvest. Others will return when their personal affairs are settled. Included in this group are those awaiting news from home or abroad before they set out to join relatives, and some who are still trying to locate lost members of their families who were deported to Germany during the war.

A very small number of Poles, chiefly the elderly people from the eastern provinces, gave fear of religious persecution as their main reason for not going home. This factor was mentioned, however, on a number of ballots in connection with political reasons.

Polish-Ukrainians

Despite repeated instructions from UNRRA directors, this group insists on describing itself as "Polish-Ukrainian" or "Ukrainian Stateless".¹¹ The constant dissemination of

¹¹ At the end of the war, approximately 2.5-3 million Ukrainians were in the Third Reich. Some were prisoners of war who had served in the Polish or Red Army; most had been forced labourers in Germany. A smaller number were political refugees and concentration camp survivors. An estimated two million Ukrainians found themselves in the occupied zones under Supreme Headquarters, Allied European Forces (SHAEF) in Austria, Germany, and

nationalistic propaganda has completely alienated them from the idea of adherence to either Poland or Russia, and thereby has eliminated all chance for a voluntary repatriation of Ukrainian peoples. Like the Poles, they give mainly political reasons for not wanting to return home but they are generally more violent in their attacks on Russia, and express fear of forced labor conditions, even "deportation to Siberia," should they dare to return. Some give supposed first hand accounts of previous persecution, such as "I don't wish to be repatriated to the Ukraine because my father was killed by the communists for his political and religious ideas and I was sent to Siberia, and had to stay for five years in a concentration camp." About 10% of the Ukrainians

Italy. After voluntary and forcible repatriation about 250,000 remained and they refused to be repatriated. About one-third were former citizens of the Soviet Union before 1939; the remaining two-thirds were from other countries, primarily from Poland.

Official UNRRA and other statistical information on the exact number of Ukrainians is, however, not entirely reliable for several reasons. The Allies used citizenship rather than ethnic origin to classify DPs, but because Ukrainian DPs came from the prewar territories of Poland, Czechoslovakia, Romania, and the Soviet Union their citizenship varied accordingly. Also, the fear of repatriation was so great that many, especially those from Soviet Ukraine, did not reveal their true nationality. In time, a change in designation by officials was precipitated by the Polish government because it insisted that Ukrainians from Poland be separated from "true" Poles, arguing that Poland did not want Ukrainians back since their former lands had been ceded to the USSR. Furthermore, they were to be repatriated to the USSR. On 6 July 1946 Poland and the USSR concluded an agreement to exchange Ukrainians in Poland for Poles in the USSR. Moreover, UNRRA and other authorities were not consistent in their use of the term "Ukrainian." Officially, Ukrainians were not designated by UNRRA as a separate nationality until the summer of 1947; however, even before then, local UNRRA officials sometimes did allow refugees to designate themselves as Ukrainians. For these reasons, official UNRRA statistics underestimate the number of Ukrainians (100,000) and Soviet citizens (10,000) while overestimating the number of Poles (275,000). (Ed.)

included in their reasons descriptions of the absence of political, cultural, religious and personal freedom at home, while others compared "Bolshevik totalitarianism" with Nazism.

They claim that their country is occupied and since they do *not* wish to become citizens of the USSR, they have in effect no fatherland to which to return. Some stated that they want a free, autonomous Ukrainian state, even within the boundaries of the new Poland. An important factor in this separatist movement has been the activity of the Greek-Orthodox clergy, who constantly use their strong influence against repatriation. As a logical consequence of this clerical influence, and the fact that Ukrainians are predominantly orthodox [sic], they seem to be much more concerned over the lack of religious freedom than do the Poles.

A few of the Ukrainian DPs lost large land holdings in the collectivization of estates by the Soviet government, so that they have a bitter personal enmity toward the new economic system. Others merely stated their dislike for a system where there is no private property.

Russians [Soviet Citizens]

The few Russians who are still left in Germany belong in three distinct categories, two of them comprising political refugees who refuse to return to Soviet Russia. The first group represents those Russians and Russian Ukrainians who came to Germany during the war as volunteers, deserters, forced laborers or POWs. They express a hatred for Communism and the "dictatorship" in Russia and would rather stay in Germany for the time being. Eventually they hope to emigrate to one of the western countries, when opportunities are available.

The second group is composed of White Russians and other Russian emigrants from 1919-20, displaced persons

left over from the last war, who never adopted a new citizenship. A few of them hold Nansen passports, while others claim that theirs were lost or taken away by the German authorities.¹² Their return to Russia is out of the question, as the majority of the older men were active counter-revolutionists, and fear reprisal by the Communists, and the younger ones, the children who were born abroad, have never lived in Russia and have no desire to go to the country from which their parents are exiles.

The third group all gave personal reasons for not going home, such as illness or marriage to Germans, Poles or other DPs.

Yugoslavs

The Yugoslavs in UNRRA camps are mostly Royalists and therefore opposed to repatriation for political reasons.¹³

¹² In 1921 Fridtjof Nansen (1861-1930), Norwegian explorer and later politician, became the first head of the League of Nation's High Commission in Connection with the Problem of Russian Refugees in Europe. After World War I, an estimated 800,000 refugees from tsarist Russia were scattered throughout Europe; most refused to return to Bolshevik-controlled Russia. Mandated to deal with this major problem, Nansen called a conference in Geneva at which sixteen nations were represented. An agreement was reached to issue for Russian refugees a special travel document, to be known as the "Nansen certificate" or "Nansen passport." By 1928 fifty-one governments had agreed to issue and recognize this passport for refugees from Russia and elsewhere. The passport gave the holder League of Nations protection and guarantees that they would not be arbitrarily treated or forcibly repatriated to the Soviet Union. (Ed.)

¹³ The Royalists were supporters of King Peter II, who ascended the Yugoslav throne in 1934. On 27 March 1941 he assumed full royal powers when a coup d'état in Belgrade overthrew the regency, but he had to flee on 6 April when the Germans attacked Yugoslavia. He established a government-in-exile in London that supported the Serbian officer, Dragoljub (Draga) Mihailović and his Chetniks. King Peter made an accommodation with the Communist partisans led by Josip Broz (Tito) in August 1944 but was deposed in November 1945.

Like the Balts and Poles, they claim a passionate love for democracy (which they interpret to be a restoration of the monarchy). On the other hand they represent a different problem from the Poles and Balts who are afraid to go home, since the Yugoslavs are for the most part ex-POWs who still consider themselves as part of King Peter's army. They do not accept their present status as a lasting one but are hoping for the chance to go home and fight Tito. In one center in the U.S. Zone, for instance, the Yugoslav leader began the poll with a spirited declaration that he and his men were soldiers, wished to be soldiers and had no plan to go anywhere, or do anything else. He then suggested that UNRRA send them all home to fight the Tito government.

The following explanation from one of the ballots is typical of the general feeling of the Yugoslav DPs. "We were determined to fight against Hitler's Germany for high principles of democracy and freedom. Now the war is over; instead of democracy and freedom we have a dictatorship in Yugoslavia. We expect nobody's charity or any reward. What we expect and claim is the most elementary right to choose our own form of government. This was proclaimed in Article 3 of the Atlantic Charter."

In 1946 there were about 150,000 Yugoslav refugees, most of whom were dispersed in UNRRA and military camps throughout Italy. Among them were monarchists, Serbian Chetniks, Croatian nationalists (Ustashi), and former partisans united in their opposition to Tito's regime. The Yugoslav government was particularly adamant in demanding their forcible repatriation. (Ed.)

Jews¹⁴

The Jews in UNRRA centers in Germany expressed a unanimous desire to immigrate, the majority of them either to Palestine or to the U.S. By far the largest number of Polish and Ukrainian Jews express a desire to go to Palestine. This desire can easily be understood in the light of strong nationalistic feelings among the eastern Jewry already prevailing before the war, coupled with the racial persecution at the hands of the Nazis, not to mention some of their own countrymen during the war. Tragic personal histories on the ballots present vividly the reasons for not returning. It is now impossible for the Jews from Eastern Europe to return to their large Jewish communities for so many of them have been wiped out, and tales of continued anti-semitism drift in daily with new refugees coming out of Poland, seeking refuge in UNRRA centers in Germany. Although many would perhaps prefer to go to some western country, the emigration quotas to these lands will be so low as to allow only a trickle of immigrants to enter. Palestine appears to be the only solution to their problem. Hundreds of ballots showed just one word as an explanation for not returning home: "Palestine."

The German Jews are also anxious to emigrate, most of them to Palestine but a large number have relatives abroad whom they wish to join in such countries as the U.S., Canada, Great Britain, France, Sweden or South America. Like the Polish and other Eastern European Jews these people feel that they can't settle down again in the country which is a constant reminder of their personal tragedies. Some even

¹⁴ In December 1945 UNRRA listed only 18,361 Jews as receiving assistance in various zones in Germany. By June 1946 the number had reached 97,333, and in June 1946, 167,531. The combined total of Jews under UNRRA care in Italy, Germany, and Austria was close to 250,000 in June 1947. (Ed.)

stated that they feared history would repeat itself in Europe and that they or their children might have to go through the same sort of persecution should they remain in Germany now.

Czechs

Although there are only about 2,000 Czechs still in Germany, a large percentage of them are staying for the same political reasons as the Poles, namely fear of Communism and the repression of personal freedom. Some fear a war in the near future and state that Czechoslovakia is too close to Russia for any measure of comfort, should a war break out.

In some cases their homes were in that part of Slovakia annexed to Russia, and they are afraid or unwilling to become Soviet citizens.¹⁵

On the whole the Czechs are not as violent as the Poles in their criticism of their home government, or in their refusal to return home. It is interesting to note that about 25% of them are holding up their decision pending the outcome of the Czech national vote, whereas a much smaller percentage are looking forward to emigration.

The reasons why the remaining Czechs don't want to return are personal. Some are sick, or are staying with sick relatives, some are married to Polish DPs while others are still searching for lost relatives in Germany. In addition, there is a small number who are employed by UNRRA, or

¹⁵ Some of these Czechoslovak citizens were no doubt Ukrainians (Lemkos) from the eastern provinces of Carpatho-Ukraine (Ruthenia), ceded to the USSR after the war. It was an area of about 8,800 square kilometers with a population of approximately 850,000. Not wishing to take part in the "voluntary" transfer to the USSR, these Ukrainians fled primarily to the U.S. Zone. (Ed.)

the Military and have the permission of their national liaison officers to remain temporarily in the DP centers.

**Western Europeans, British, U.S.,
and Smaller Groups**

The small number of these nationals are staying in Germany solely for personal or economic reasons. Either they are married to Germans or other DPs whom they are not yet allowed to take home with them, or else they wish to settle in Germany where they have economic interests. The last reason is particularly true in the French Zone where many of the DPs are living privately and can carry on a fairly normal life in the German community. A few individuals are probably collaborators who are trying to hide in Germany, while others have lived in Germany for some time before the war, and do not wish to move. As in the case of the Czechs, many of the Western Europeans are working for UNRRA or the military authorities with the permission of their national liaison officers. These jobs offer more security than they could find at home. Several Frenchmen, Italians and Dutchmen say that they fear to return to the present unstable economic conditions in their countries. They know of the shortages of food, clothing and employment possibilities and prefer to stay in Germany under comparatively favorable conditions until the situation in their homelands improves. In the British Zone there are small numbers of Dutch bargees [bargemen] who will return as soon as the canals and waterways are opened.

Some so-called Armenians (including "Turks" and "Iranians") fear religious persecution in their homelands.

ANNEX A

TYPICAL NEGATIVE REPLIES ON THE BALLOTS
OF THE PRINCIPAL NATIONALITY GROUPS

I. Estonians, Latvians, Lithuanians

1. "Under the present circumstances I do not want to return, for I know well enough who is ruling behind the 'iron curtain' and what kind of life the people lead in this 'most liberal country'."

2. "I am not a Communist."

3. "I have already been a political deportee to Siberia for four years."

4. "I am a mother and I want to raise my child myself."

5. "My country has ceased to exist."

6. "In Estonia, Latvia and Lithuania there is no democratic government."

7. "I cannot return. My brother, sister, father and mother were deported to Siberia because they did not go to the poll to vote for the Communists."

8. "Russia."

9. "I have never been a Russian citizen and I am not interested to serve in the Russian army. Further I don't recognize the one-party system."

10. "Stalin."

11. "In all countries occupied by the USSR people are physically and morally suppressed."

12. "My country is occupied by the Bolsheviks."

13. "In 1940 my father was arrested and killed because he was a Russian officer under the Czars. My mother was sent to Russia, then I escaped."

II. Poles

1. "Poland is not free."

2. "The Russians are dominating the Polish Government."

3. "Quoting Mr. Churchill's speech; an 'iron curtain' is hanging from Stettin to Trieste. Behind it an ignorant slave state is hidden from the eyes of us all, etc." — "I am a Democrat, not a Communist."

4. "Communist dictatorship. No freedom of personal opinion. Russians annihilate everything that is not Russian and communistic."

5. "Stalin annihilates people as well as Hitler."

6. "I don't trust Stalin and his government in Poland."

7. "Uncertain situation in Poland. The presence of the Soviet Army is dangerous to the freedom of my country."

8. "I don't agree with the policy of the Government and the persecution of the church and the lack of private property and freedom."

9. "I am afraid of Stalin, I am afraid of Siberia. Poland is not free."

10. "After the election of a democratic government, I shall return home."

11. "The Russians occupy that part of Poland where I lived. My home and family are gone."

12. "I can't find my family."
13. "I am ill and tired after the hard work in Germany."
14. "If I go back I am sure they will kill me or send me to Siberia."
15. "They sent part of my family to Siberia and confiscated our farm."
16. "I have been persecuted by the Communists and condemned for exile to Siberia. I don't want to try to live under the Communists again."
17. "My husband is not going back home and so I don't want to go."
18. "When I get a letter from my family saying that they are alive, then I shall return home."
19. "Because there is starvation in my country."
20. "My family is in America. I shall wait until I can also go there."

III. Polish-Ukrainians

1. "I don't want to live under dictatorship and terror."
2. "I am against violations and terror in the USSR. I am against men who persecute religion, who turn peasants into slaves. I am against the one-party system."
3. "Two of my brothers were killed. My parents died in jail after being there a long time. My brother was sentenced to forced labor."
4. "My homeland is at present occupied by Soviet Russia, which follows the policy of general terror against those who are opposed to the communistic system. They

persecute religion (Greek-Orthodox); bishops and priests are sent to Siberia. Catholic churches are closed. Because of these reasons I will not return."

5. "I don't agree with the totalitarian system in the USSR. Galicia belongs now to the USSR. I never was, neither am, nor wish to be a citizen of the USSR. Persecution of the Greek-Orthodox Church."

IV. Russians [Soviet Citizens]

1. "I don't agree with Stalin-terror and oppression of people. The system has nothing to do with democracy."

2. "I have been persecuted by the NKVD since 1929. Most of the time I have been obliged to live under a false name."

3. "Democracy in the Soviet Union exists only on paper. There is only freedom to vote for the candidates of the Communistic Party and for its resolutions."

4. "The Soviet regime is not a Russian government. The main idea of the Soviet government is a world revolution."

5. "Communism is even worse than Nazism."

6. "In the Soviet Union there is no free work nor any private property. There is only forced, slave-like labor in the kolchoz[sic] (Government farms) and in the factories or businesses, all run by the Government."

V. Jews

1. "Palestine is my Fatherland."

2. "Poland is covered with Jewish blood; even now the Poles are persecuting Jews. We can visit the cemeteries, but we cannot live there. Therefore I want to immigrate to

the U.S. to join my relatives in the best democracy in the world."

3. "I have nobody left at home."

4. "My husband was murdered by the Germans. I spent three years in the KZ (concentration camp). My relatives are in foreign countries. They will take care of me."

5. "All my relatives were killed in Auschwitz. I can't live among the murderers of my parents."

6. "Because of anti-Semitism in Poland, and I have no family left there."

7. "Because the Poles and Ukrainians are killing Jews."

8. "I am the only survivor of a family of eight. I have no relatives in Europe. I am miserable and want to join relatives in America. I have an affidavit."

VI. Western Europeans and Smaller Groups

1. "At present there is no job, life is too expensive in France and as I am alone, I have nothing to look forward to at home."

2. "I will not be sent back because I have no job and no home." (Dutch)

2. "I don't want to go back to Greece, because I have no job and there is a food shortage."

4. "I am married to a Pole, but the Dutch Government won't allow her to come home with me. I shall wait in Germany."

Source: United Nations (UNRRA) Archives, New York.
PAG-4/3.0.11.0.1.4:2, "Council Resolution 92 etc."

APPENDIX B

**PRESIDENT TRUMAN'S PLAN FOR REFUGEES,
DEPARTMENT OF STATE IMMIGRATION
AND NATURALIZATION SERVICE MONTHLY
REVIEW (HEREINAFTER INS MONTHLY
REVIEW), VOL. III, NO. 7
(JAN. 1946. pp. 254-255)**

On December 22, 1945 President Truman announced a far-reaching program to facilitate the admission into the United States, within the framework of existing immigration laws and regulations, of displaced persons and refugees from Europe. The President's plan encompasses two principal groups. The first of these is the group of refugees now in the relocation camp at Oswego, N. Y. Almost 1,000 persons were originally housed in this camp, after having been brought to the United States on an emergency basis by order of President Roosevelt. Some 900 refugees still at Oswego may now become permanent residents of the United States "through appropriate statutory and administrative processes." Officers of the Department of State and the Immigration and Naturalization Service are presently processing the cases of those of the internees who desire to become permanent residents of the United States, and if found eligible, they will be granted preexamination or other appropriate relief to enable them to establish legal residence.

The major group affected by President Truman's directive of December 22, 1945 are displaced persons and refugees who are natives of Central and Eastern Europe and the Balkans. The annual immigration quotas for these countries total approximately 39,000. Statutory restrictions preclude the allocation of more than 10 percent of the annual quota in any single month. Consequently, no more than 3,900 visas

may be issued in any one month to natives of the affected countries.

The President declared that "common decency and the fundamental comradeship of all human beings require us to do what lies within our power to see that our established immigration quotas are used in order to reduce human suffering." Therefore he directed that the following procedure be followed "to facilitate full immigration to the United States under existing quota laws":

"The Secretary of State is directed to establish with the utmost dispatch consular facilities at or near displaced person and refugee assembly center areas in the American zones of occupation. It shall be the responsibility of these consular officers, in conjunction with the immigrant inspectors, to determine as quickly as possible the eligibility of the applicants for visas and admission to the United States.

For this purpose the Secretary will, if necessary, divert the personnel and funds of his department from other functions in order to insure the most expeditious handling of this operation. In cooperation with the Attorney General he shall appoint as temporary vice consuls, authorized to issue visas, such officers of the Immigration and Naturalization Service as can be made available for this program.

Within the limits of administrative discretion, the officers of the Department of State assigned to this program shall make every effort to simplify and to hasten the process of issuing visas. If necessary, blocs of visa numbers may be assigned to each of the emergency consular establishments.

Each such bloc may be used to meet the applications filed at the consular establishment to which the bloc is assigned. It is not intended, however, entirely to exclude the issuance of visas in other parts of the world.

Visas should be distributed fairly among persons of all faiths, creeds and nationalities. I desire that special attention be devoted to orphaned children to whom it is hoped the majority of visas will be issued.

With respect to the requirement of law that visas may not be issued to applicants likely to become public charges after admission to the United States, the Secretary of State shall cooperate with the immigration and naturalization service in perfecting appropriate arrangements with welfare organizations in the United States which may be prepared to guarantee financial support to successful applicants. This may be accomplished by corporate affidavit or by any means deemed appropriate and practicable.

The Secretary of War, subject to limitation imposed by the Congress on War Department appropriations, will give such help as is practicable in:

(A) Furnishing information to appropriate consular officers and immigrant inspectors to facilitate in the selection of applicants for visas; and

(B) Assisting until other facilities suffice in:

(1) Transporting immigrants to a European port;

(2) Feeding, housing and providing medical care to such immigrants until embarked; and

(C) Making available office facilities, billets, messes and transportation for Department of State, Department of Justice and United Nations Relief and Rehabilitation Administration personnel connected with this work, where practicable and requiring no out-of-pocket expenditure by the War Department and when other suitable facilities are not available.

The Attorney General, through the Immigration and Naturalization Service, will assign personnel on duty in the American zones of operation to make the immigration inspections, to assist consular officers of the Department of State in connection with the issuance of visas and to take the necessary steps to settle the cases of those Allies presently interned at Oswego through appropriate statutory and administrative processes.

The administration of the War Shipping Administration will make the necessary arrangements for water transportation from the port of embarkation in Europe to the United States, subject to the provision that the movement of immigrants will in no way interfere with the scheduled

return of service personnel and their spouses and children from the European Theater.

The Surgeon General of the Public Health Service will assign to duty in the American zones of occupation the necessary personnel to conduct the mental and physical examinations of prospective immigrants prescribed in the immigration laws."

Ugo Carusi, Commissioner of Immigration and Naturalization, was designated by the President to serve as Chairman of an interdepartmental committee, which includes representatives of the Department of State, War, and Justice, the War Shipping Administration, and the Public Health Service, to supervise the execution of President Truman's directive. Commissioner Carusi, accompanied by Howard K. Travers, Chief of the Visa Division of the State Department, and Dr. Ralph C. Williams, Assistant Surgeon General of the Public Health Service, has left for Europe to make arrangements for the speedy inauguration of the President's program.

It is anticipated that officers of the State Department, the Public Health Service and the Immigration and Naturalization Service will be stationed in the American zone of occupation in Germany, to which immigration activities under the President's directive will be confined for the time being, in order to pass on the qualifications of prospective immigrants before they embark for the United States.

APPENDIX C

DISPLACED PERSONS, BY INS COMMISSIONER
UGO CARUSI, INS
MONTHLY REVIEW, VOL. IV, NO. 5,
(NOV. 1946 @ PP. 54-56)

By Commissioner Carusi

The *Monthly Review*¹ has previously reported the plans which were made by the President to give some measure of relief to the displaced people in Europe. In March of this year I went abroad with Mr. Travers² of the Visa Division of the State Department, Dr. Dunnahoo of the United States Public Health Service and Lieutenant Colonel Buster of the War Department to implement those plans.

We established our headquarters in Frankfort, Germany, which was also the headquarters for the European Theater Operations. Our job was to discover who the displaced persons were, how many of them there were, what countries they represented, what quotas were available for those nationalities or countries, what transportation facilities there were and what consular offices would have to be established in order to process the displaced persons with the greatest possible speed and the least amount of confusion.

After we had consulted with UNRRA, the Army and the interested voluntary relief agencies, consulates were established by the State Department in Berlin, Hamburg, Stuttgart, Frankfort, and Munich and the task of processing cases among the displaced persons who wished to come to America was begun.

¹ See "President Truman's Plan for Refugees", *Monthly Review*, Vol III, No. 7 (January 1946) pp. 254-255.

² Presently American Consul-General in Vancouver, British Columbia.

It was immediately necessary to establish categories to describe those persons who could properly be classified as displaced persons. It was impossible to define displaced persons because of the danger of including known pro-Nazis who were displaced but obviously not contemplated by the President's Directive. Roughly stated, we did include persons who were brought into Germany against their will for forced labor, those who were forced to evacuate their homes for military reasons other than for service in the army, persons who feared to return to their homes because of possible religious or political persecution, those who had fled from their homes because they feared concentration and relatives of such persons whose exclusion might break up family groups. December 22 was chosen as the day prior to which the determination of a displaced person's status was to be made, this date being selected in order to avoid an influx of people into the American Occupation Zone other than those coming to join families already there.

A large percentage of displaced persons were not in camps. Many lived in communities with the help and guidance of UNRRA. The displaced persons' camps are mainly former military barracks or concentration camps and the present occupants were there as inmates when they were concentration camps.

The President had requested that care be exercised to assure that no one group would be favored over another nor discriminated against. The available quotas are roughly 39,000 per year, of which about 25,000 are German. In the entire Zone there were roughly 500,000 displaced persons, about 200,000 of whom were Poles. There were also large numbers from the Baltic States.

The procedure established for processing those people interested in coming to this country is, in general, as follows. Questionnaires are sent to the areas within the American

Occupation Zone asking for the information necessary to the issuance of a visa and, in addition, questions as to religion and the location of relatives. Medical examinations are conducted in the camps. The questionnaires are screened by the Army for security reasons and by American Consuls against their records. Those who pass muster are brought to an assembly center near a Consulate from where they can visit the Consul for the purpose of making the regular applications for visas. The normal procedures then prevail. Upon issuance of visas to sufficiently large groups, the Army arranges transportation to the port of embarkation which is in Bremen and the steamship tickets are provided either by the individuals themselves or by some persons or organizations acting in their behalf. Immigration inspections are conducted in this country but the thorough screening in Europe makes the possibility of rejection on this side very remote. They are treated as displaced persons in the matter of food and handling until they board ship after which they become regular passenger immigrants.

UNRRA and the voluntary relief agencies assist in the distribution and execution of questionnaires so that the Consular Offices are able to handle the cases with the greatest possible speed. For obvious reasons, many people are without birth or baptismal certificates and the Consuls are empowered to make allowances and use discretion in the matter of accepting unsupported statements. Many of these people have become suspicious of authority and have trained themselves over a period of years to lie in self-preservation. This suspicion is breaking down, as we have been able to inspire confidence and demonstrate that we are a different sort of keeper. This is a difficult and complex problem because we want to be sure that those who come can readily adjust themselves to our mode of living, be self-sustaining and make contributions to our society and economy.

Seven social welfare agencies have furnished the Immigration and Naturalization Service with corporate affidavits³ as a guarantee that the displaced persons whom they sponsor will not become public charges upon their arrival in the United States. These organizations are the *American Christian Committee for Refugees, Inc.*, the *Catholic Committee for Refugees*, the *Hebrew Sheltering and Immigrant Aid Society*, the *International Rescue and Relief Committee, Inc.*, the *United Service for New Americans*, the *Vaad Hatzala Emergency Committee* and the *United States Committee for the Care of European Children, Inc.* The *American Christian Committee for Refugees* has signed a corporate affidavit for 500 people and indicated that it will increase that number as needed. Two hundred and sixty-eight displaced persons have arrived under their sponsorship. The *Catholic Committee for Refugees* has provided a corporate affidavit for 200 Roman Catholic persons of which 163 have been used. The *Hebrew Sheltering and Immigrant Aid Society* has signed a corporate affidavit for 4,500 Jewish persons of whom 627 have arrived. The *Vaad Hatzala* which is particularly interested in Orthodox Rabbis, scholars and their children, has provided a corporate affidavit for 3,500 persons, will increase this number whenever it becomes necessary and has sponsored the arrival of 2,228 individuals. The *International Rescue and Relief Committee* has provided a corporate affidavit for 500 people of which 119 have arrived. The *United States Committee for the Care of European Children* has signed a corporate affidavit for 2,000 children, this being the only organization authorized to sponsor unaccompanied children of whom 296 have arrived under its sponsorship. In addition, 963 displaced persons have come to the United States under

³ See "Guarantees of Support of Refugee Children and Displaced Persons", *Monthly Review*, Vol. IV, No. 4 (October 1946) pp. 46-49.

individual sponsorship. This brings the total to date to 4,664.

The first displaced persons arrived in the United States aboard the *SS Marine Flasher* on May 20, 1946 and there have been seven subsequent arrivals, all of which have been at the port of New York. All of the ships are met by a representative of the Immigration and Naturalization Service and by representatives of the interested welfare agencies, the latter for the purpose of directing the persons whom they sponsor to their destinations.

Considering the limited personnel with which we have to work, the restricted transportation facilities, the necessity for adhering to the quota immigration law and the fact that the American Occupation Zone contains a relatively small percentage of the displaced persons in Europe, I believe that an excellent job is being done. However, it should be remembered that the entire problem of displaced persons in Europe amounts to some 2,000,000 individuals. Most of them are former slave laborers, others are political or racial refugees and all of them fear unsettled economic conditions or persecution in their homelands. They are spread over all of the countries of central Europe and in addition, uncounted thousands are to be found in Russia, Palestine and the Far East. Nearly a million displaced persons in Germany, Austria and Italy are being fed by UNRRA or the Allied armies. The most optimistic estimates indicate that, at best, between 500,000 and 600,000 of these people are likely to remain as a long-term problem for the United Nations' new International Refugee Organization.

Certain conclusions can be drawn from our experience thus far in the program which we have operating. The 39,000 quota numbers available on an annual basis to our present program can never be filled because of the large number, 25,000, which must be charged to the German

quota and the comparatively small number of Germans, including the few surviving German Jews, who wish and can qualify to come to the United States. Transportation facilities will have to improve tremendously before any appreciable increase in immigration to the United States can be expected and this statement applies particularly to those individuals who might wish to come from Europe. And a change in the present quota laws will have to be made before they benefit any large number of displaced persons because the largest groups of displaced persons have the smallest quotas available to them. The extent to which the United States may further obligate itself in the matter of displaced persons is a question which will face the next Congress. We are now demonstrating what can be done pursuant to existing legislation. The extent to which the country will take on further obligations by accepting and caring for larger numbers of displaced persons depends entirely on whether legislation to that effect will be forthcoming.

APPENDIX D

**DISPLACED PERSONS IN THE UNITED STATES,
INS MONTHLY REVIEW, VOL. V. NO. 7,
(JAN. 1948 @ PP. 103-105)**

It has been a little over two years since the President of the United States on December 22, 1945, set forth a policy regarding the admission of displaced persons. The directive¹ of that date outlined a plan for admitting displaced persons within the framework of the immigration laws. The tables presented in this report bring to November 30, 1947, available statistics concerning displaced persons admitted to the United States by the officers of the Immigration and Naturalization Service.

In a recently published report of a Special Subcommittee of the Committee on Foreign Affairs, it was stated that "displaced persons constitute the remainder of the forced laborers and concentration-camp victims of the Nazis, and are those who fled before the occupation armies of a dictatorship to which they were violently opposed or who fled in legitimate fear of political or religious persecution from their homelands."²

The statistics appearing in this article were furnished by the Office of the Assistant Commissioner for Research and Education, Immigration and Naturalization Service.

¹ See "President Truman's Plan for Refugees," *Monthly Review*, Vol. III No. 7 (January 1946), pp. 254-255. See also, "Displaced Persons" by Ugo Carusi, *Monthly Review*, Vol. VI, No. 5 (November 1946), pp. 54-56; "Displaced Persons—Location and Activity in the United States" by Hugh Carter, *Monthly Review*, Vol. IV, No. 11 (May 1947), pp. 138-144.

² *Displaced Persons and the International Refugee Organization: Report of a Special Subcommittee of the Committee on Foreign Affairs, 80th Congress, First Session, p. 2, Washington, 1947.*

The members of this Committee found in their visits to approximately 150 displaced persons camps in the United States, British, and French occupied zones of Germany, Austria, and Italy, that there were three principal groups of displaced persons: (1) the liberated forced-labor group who were brought into Germany from Poland, Yugoslavia, and the Ukraine; (2) the Baltic group, those who fled from the Baltic States ahead of the armies in 1944 (the Balts include Latvians, Lithuanians, and Estonians); and (3) the Jewish displaced persons, most of whom have come from the Eastern European countries. There is an additional group of displaced persons, the Volksdeutsche. This group consists of members of German-speaking minorities who had settled in Southern and Eastern Europe. During the war and after, these minorities moved or were expelled from their homes. The bulk of the displaced persons in camps therefore was born in Southeastern Europe.

Of the 28,789 displaced persons admitted to the United States under the President's directive through November 30, 1947, 56 percent were born in Southern and Eastern Europe, 43 percent in Northern and Western Europe, principally Germany, and one percent from all other countries. (See Table 1.)

Ninety-three percent of those admitted came as quota immigrants, and five percent as non-quota, chiefly wives of citizens, while two percent were nonimmigrants who were resident aliens returning to this country or students.

TABLE NO. 1

Displaced Persons Admitted to the United States Under
The President's Directive of December 22, 1945,
By Class of Admission and Country of Birth:
December 22, 1945 to November 30, 1947*

Country or region of birth	Immigrants				
	Total persons	Total immigrants	Quota	Non-quota	Non-immigrants
All Countries	28,789	28,241	26,801	1,440	548
Europe	28,430	27,886	26,517	1,369	544
Albania	5	5	5	—	—
Austria	1,251	1,237	1,181	56	14
Belgium	108	108	107	1	—
Bulgaria	16	16	16	—	—
Czechoslovakia	2,120	2,013	1,927	86	107
Danzig	84	84	81	3	—
Denmark	8	8	8	—	—
Eire	5	5	5	—	—
Estonia	97	96	93	3	1
Finland	7	7	7	—	—
France	114	113	99	14	1
Germany	11,949	11,909	11,509	400	40
Great Britain { England	68	67	64	3	1
Scotland	5	5	5	—	—
Wales	2	2	2	—	—
Greece	9	7	7	—	2
Hungary	636	595	518	77	41
Italy	66	66	59	7	—
Latvia	356	354	351	3	2
Lithuania	558	555	511	44	3
Netherlands	89	89	88	1	—
Northern Ireland	8	8	8	—	—
Norway	4	4	3	1	—
Poland	8,603	8,322	7,759	563	281
Portugal	8	7	5	2	1
Rumania	377	337	285	52	40
Sweden	7	7	6	1	—
Switzerland	38	38	36	2	—
Turkey	7	7	7	—	—
U. S. S. R.	1,275	1,267	1,239	28	8
Yugoslavia	536	534	512	22	2
Other Europe	14	14	14	—	—
China	173	171	141	30	2
Palestine	23	22	19	3	1
Asiatic U. S. S. R.	48	48	48	—	—
Other Asia	29	29	27	2	—
Canada	3	3	—	3	—
West Indies	3	3	1	2	—
Central America	4	4	2	2	—
South America	20	20	1	19	—
Africa	16	15	14	1	1
Other Countries	40	40	31	9	—

*The first vessel carrying displaced persons arrived May 20, 1946.

The single country with the largest number of admissions is Germany. When it is recalled that the annual quota for Central and Eastern Europe and the Balkans is approximately 39,000, of which almost 26,000 is for Germany and 13,000 for the remaining countries, it is easy to understand that there are quota numbers available for persons born in Germany, whereas other countries having proportionately greater numbers of displaced persons have fewer quota numbers available and therefore can have proportionately fewer admissions to the United States.

The median age of displaced persons rose from 28.7 years in the six months July 1-December 31, 1946, to 33.9 in the comparable period, July 1-November 30, 1947. The increase in preference quota of parents being brought to the United States by citizens is one reason for the increasing average age. In contrast, during the fiscal year 1947 the median age of all immigrants was 27.4. The low median age for all immigrants is accounted for in large part by the young war brides coming to the United States. For the cumulative total of displaced persons, the median age is 31.9, as may be observed in Table 2.

The sex distribution for all immigrants in 1947 and for all displaced persons admitted is shown below:

	Immigrants Year ended June 30, 1947	Displaced persons December 22, 1945- November 30, 1947*
Total	147,292	28,789
Male	53,769	14,359
Female	93,523	14,430
Males per 1,000 females	57.5	99.5

*The first vessel carrying displaced persons arrived May 20, 1946.

TABLE NO. 2

**Displaced Persons Admitted to the United States Under
The President's Directive of December 22, 1945,
By Sex, Age, and Marital Status:
December 22, 1945 to November 30, 1947***

<u>Age Group</u>	<u>Total</u>	<u>Male</u>	<u>Female</u>
Total	28,789	14,359	14,430
12 years and under	2,521	1,244	1,297
13 to 20 years	4,440	2,396	2,044
21 to 30 years	6,967	3,390	3,557
31 to 40 years	5,390	3,050	2,340
41 to 50 years	3,883	1,926	1,957
51 to 60 years	2,552	1,214	1,338
61 to 70 years	1,980	758	1,222
71 to 80 years	969	369	600
81 years and over	87	32	55
Median age	31.9	31.6	32.3
<u>Marital Status</u>			
Total	28,789		
Single	12,324		
Married	12,676		
Widowed	3,377		
Divorced	412		

*The first vessel carrying displaced persons arrived May 20, 1946.

The report of the Special Subcommittee has a table showing the skills of displaced persons in camps in the United States Zone of Germany in May 1947. The table indicates that as many as a seventh of the persons were professional and semi-professional workers, and more than a fifth were craftsmen and skilled workers.

While not strictly comparable since the period is not the same, the occupation distribution for all immigrants admitted in the fiscal year ended June 30, 1947, and for the displaced persons admitted between July 1 and November 30, 1947, is shown in Table 3.

TABLE NO. 3

**Major Occupation of Immigrants Admitted to the
United States, Year ended June 30, 1947,
And of Displaced Persons Admitted,
July 1-November 30, 1947**

Occupation	Immigrants admitted year ended June 30, 1947		Displaced persons admitted, July 1, 1947 to Nov. 30, 1947	
	No.	Percent	No.	Percent
Total	147,292	100.0	8,324	100.0
Professional and semi-professional workers	10,891	7.4	916	10.4
Farmers and farm managers	3,462	2.4	196	2.2
Proprietors, managers, officials, except farm	5,886	4.0	587	6.7
Clerical, sales, and kindred workers	13,961	9.5	719	8.1
Craftsmen, foremen, and kindred workers	8,726	5.9	817	9.3
Operatives and kindred workers	10,580	7.2	1,002	11.4
Domestic service workers	4,922	3.3	87	1.0
Protective service workers	292	.2	22	.2
Service workers, except domestic and protective	3,590	2.4	212	2.4
Farm laborers and foremen	442	.3	30	.3
Laborers, except farm	2,831	1.9	62	.7
No occupation	81,709	55.5	4,174	47.3

The Immigration and Naturalization Service cooperates with a number of private agencies to facilitate the entry into the United States of displaced persons. Toward that end, the Service accepts applications from social agencies that desire to execute affidavits guaranteeing that a specified number of persons whom they wish to sponsor will not become public charges. These affidavits are called corporate affidavits. An agency desiring to participate in the program is requested to furnish information concerning the financial status of the organization, the purpose for which it was incorporated, and other material to show that the organization is able and willing to assume responsibility for the number of persons specified. If the agency is approved, it

may thereafter submit corporate affidavits to United States consuls in connection with applications for immigration visas by displaced persons.

Of the 28,789 displaced persons admitted to the United States through November 30, 1947, 36 percent were sponsored by agencies, while 64 percent were sponsored by individuals, usually relatives or close friends of the immigrants. (See Table 4.)

TABLE NO. 4

Agency Participation With Respect to Displaced Persons Admitted to the United States Under The President's Directive of December 22, 1945: December 22, 1945, to November 30, 1947*

<u>Agency</u>	<u>Persons sponsored</u>	
	<u>Number</u>	<u>Percent</u>
Total	28,789	100
Church World Service, Inc.	971	3
Catholic Committee for Refugees	1,096	4
Hebrew Sheltering and Immigrant Aid Society	1,823	6
International Rescue and Relief Committee	301	1
United States Service for New Americans	5,039	18
— U. S. Committee for Care of European Children	1,150	4
Vaad Hatzala Rehabilitation Committee	26	—
Individually sponsored	18,383	64

*The first vessel carrying displaced persons arrived May 20, 1946.

From time to time as the need arises, supplemental affidavits to cover additional groups are received and considered for approval. When affidavits are approved, the Visa Division of the Department of State is advised and that division cables the information to the appropriate consuls of this country, since the question of who are displaced persons within the meaning of the President's directive and who of those are entitled to immigration visas for permanent residence in the United States are matters determined by the Department of State through its consuls abroad.

The first corporate affidavits were approved for displaced persons located in the United States, British, and French zones of Austria and Germany. In April 1947, corporate affidavits were approved for displaced persons located in Shanghai.

Persons sponsored by agencies are generally of the same religious faiths as the social agencies sponsoring them. That is, the Church World Service sponsors the Protestant group; the Catholic Committee, the Catholic group; and HIAS, USNA, and Vaad Hatala Emergency Committee, the Jewish group. The International Rescue and Relief Committee, the United States Committee for Care of European Children, and the American Federation of International Institutes are non-partisan organizations.

Pursuant to the requirements of the corporation affidavit, the agency submits a detailed report for each person under its sponsorship within the time limit prescribed by the corporate affidavit, giving the place of residence of the individual, how he is being maintained, if employed, the weekly wage earned, and whether the person has become a public charge since entering into the United States. If the report shows that the person is steadily employed, is self-supporting, has had no serious illness, and has not become a public charge, no action is taken on the report and under the terms of the corporate affidavit the agency is automatically released from further responsibility sixty days from receipt of the report by the Service.

APPENDIX E

DEPT STATE BULL., Vol XV. No. 386,
Nov. 24, 1946, pp. 934-938
U.S. POSITION ON INTERNATIONAL
REFUGEE ORGANIZATION

STATEMENT BY REPRESENTATIVE OF THE U.S.
DELEGATION TO THE UNITED NATIONS¹

To begin with, Mr. Chairman, I should like to state very briefly the position of the United States on this International Refugee Organization, which will care for and help to rehabilitate nearly a million people from Europe and the Far East. As long as they are refugees and displaced persons they constitute a threat to peace and good relations among governments.

The maintenance in camps of these persons leads to deterioration among them as human beings and is an economic waste for all the nations of the world. We, in the United States, feel this most keenly, since from practically all the countries where they come from we have received citizens who have built up our nation. Therefore, the United States supports the principles of the General Assembly resolution of February 12, 1946 namely:

- (a) The problem is international in character.
- (b) There shall be no compulsory repatriation.
- (c) Action taken by IRO must not interfere with existing international arrangements for apprehension of war criminals, Quislings, and traitors. This is being

¹ Made by the U.S. representative, Mrs. Eleanor Roosevelt, before Committee 3 of the General Assembly at Lake Success on Nov. 8 and released to the press by the U.S. Delegation to the United Nations on the same date.

done by military occupation forces and is not the responsibility of this new organization.

As a consequence we support the draft constitution of the IRO which reflects the foregoing principles.

The United States has supported the principles advocated by my colleague from the U.S.S.R. which is proved by the numbers of people that have been repatriated from the United States zone. However, it would be foreign to our conception of democracy to force repatriation on any human being. Three and one-half million persons have been repatriated from the United States zone, but our people will always believe in the right of asylum and complete freedom of choice.

The Pilgrims, the Huguenots, and the Germans of 1848 came to us in search of political and religious freedom and a wider economic opportunity. They built the United States.

These people now in displaced-persons camps are kin to those early settlers of ours, and many of them might have relatives in the United States.

My Government urges the participation in the IRO as members by all peace-loving nations. There is no question but that this participation will entail financial sacrifices by all participating governments. For a time it will be a heavy burden; but in the long run it will be an economy and well worth the cost.

The finances of our organization will be considered in committee 5, where the financial burden will be allotted to the participating governments, so that the cost will be equitably shared by all, and each government will pay according to the standards laid down by committee 5.

In the interest of brevity I shall comment at this time only on some of the essential points in Mr. Vyshinsky's

speech of Wednesday, leaving other points for comment when we discuss the draft constitution article by article.

First of all I should like to say that Mr. Vyshinsky's view that no assistance should be given to those who for valid reasons decide not to return to their countries of origin is inconsistent with the unanimous decision of the General Assembly in the resolution on displaced persons of February 12, 1946. That clearly provides that these persons shall become the concern of the International Refugee Organization.

Mr. Vyshinsky says that this problem is very simple. It can be solved by repatriating all the displaced persons. In fact, those who do not wish to be repatriated must fall into this category. I think this point of view fails to take into consideration the facts of political change in countries of origin which have created fears in the minds of the million persons, who remain, of such a nature that they choose miserable life in camps in preference to the risks of repatriation.

Our colleague from Poland mentioned that since arrangements had been made to give people food allowances after their return home the numbers going home had increased. I think he is quite right that the fear of an economic situation has deterred a number of people from taking the risk of repatriation, but not all of them are actuated by consideration of the economic situation in their country of origin.

Seven million people have already been repatriated; repatriation is still proceeding. One thousand Poles are leaving the U.S. zones of Germany and Austria daily. The military administration which accomplished this result can hardly be held solely responsible for the failure of the last million to return.

It was a new point, I think, which Mr. Vyshinsky raised when he presented his position that those who do not choose to return to their countries of origin shall not be resettled, shall receive no aid towards settling somewhere else. This leaves them with the prospect of spending the rest of their lives in assembly centers as long as the IRO supports them or else of facing starvation. They obviously cannot be left in assembly centers to their own devices. They would continue as an irritant in good relations between friendly governments and contribute to delay in the restoration of peace and order which is the concern of all governments. There is no reason why they should become wanderers if instead they can be given an opportunity for resettlement in some country which has a future to offer them.

By another provision of the General Assembly resolution of February 1946, which, I think, Mr. Vyshinsky must have forgotten, no action taken shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, Quislings, and traitors in conformity with international arrangements or agreements. These arrangements, however, are the responsibility of other government bodies, including the military authorities.

I can tell you very briefly how arrangements for the apprehension of Quislings works out under the U.S. occupational authorities. U.S. officials are continuously engaged in screening the refugee personnel to locate Quislings or those who for other reasons are not entitled to be given asylum. When special complaints are received from other governments they are made by the governments' liaison officers with the United States Forces, European Theater. USFET thereupon makes an investigation through Army channels. If the investigation appears to substantiate the complaint, the case goes before a board of officers, which makes the

final determination. This method of procedure has in general been satisfactory; but it must be emphasized that this committee here is not, and should not, be the forum for debate as to its effectiveness. It is not our function here to discuss the adequacy of these arrangements or the performance under them. We are concerned with final decisions on the draft of the constitution of IRO. This draft clearly excludes from the benefits of the organization war criminals, Quislings, and traitors. We can hope that such persons will be entirely eliminated by the time the IRO begins to function.

Mr. Vyshinsky spoke of members of various military groups. The military character of different groups and their members, we think, has been greatly exaggerated. They are the concern of the military authorities, however, and will be handled by them. Those who fought with the Germans and collaborated with them are clearly excluded from assistance from the IRO in the constitution before us. I have asked that the U.S. military authorities supply me with a report on each of the incidents complained of by Mr. Vyshinsky where the U.S. is concerned, and I shall report these findings in writing to the committee, if it so desires, as soon as they are available.

Now we come to the point which Mr. Vyshinsky made that all propaganda should be suppressed in the camps. He challenges us on the point that under the guise of freedom of expression propaganda hostile to the countries of origin is tolerated. On this point I am afraid we hold very different ideas. But this does not preclude cooperation between us. We, in the United States, tolerate opposition provided it does not extend to the point of advocacy of the overthrow of government by force. Unless the right of opposition is conceded, it seems to me that there is very little possibility that countries with differing conceptions of democracy can live

together without friction in the same world. Much progress has been made to date in dealing with this problem of propaganda within the framework of these divergent views. With patience and understanding we can achieve still further progress in this direction.

Mr. Vyshinsky objects to the inclusion of certain categories of refugees and displaced persons.

One group consists of those who, as a result of events subsequent to the outbreak of the second World War, are unable or unwilling to avail themselves of the protection of the government of their countries of nationality or of former nationality.

This paragraph covers those who for political reasons, territorial changes, or changes of sovereignty are unable to return to their country. That paragraph is in annex 1, part 1, section A, paragraph 2. I regret that Mr. Vyshinsky cannot confirm the agreement reached at the last session of the Economic and Social Council on this point. We consider it essential that the paragraph be retained. But since he asked who these people are, I should like out of my own experience to mention a few. I visited two camps near Frankfurt, where the majority of people had come from Estonia, Latvia, and Lithuania. I have received innumerable petitions. My mail today carried three from people in different countries, who, because changes had come in the types of government in their countries, felt that they did not wish to return. That does not mean that they do not love their country; it simply means that they prefer the country as it was before they left it. That country they feel no longer belongs to them. I gather that Mr. Vyshinsky felt that anyone who did not wish to return under the present form of government must of necessity be Fascist. I talked to a great many of these people who do not strike me as Fascist, and the assumption that people do not wish to return to the country of their origin because those countries are now under what is called a democratic

form of government does not seem to allow for certain differences in the understanding of the word *democracy*. As Mr. Vyshinsky uses it, it would seem that democracy is synonymous with Soviet, or at least a fairly similar conception of political and economic questions. Under that formula I am very sure that he would accept some of the other nations in the world who consider themselves democracies and who are as willing to die for their beliefs as are the people of the Soviet Union.

Mr. Vyshinsky also objected to certain exceptions to the general rule that those who had voluntarily assisted the enemy are excluded from the concern of the IRO. The intent of the exemptions is to cover those who were forced to perform slave labor or who may have rendered humanitarian assistance, such as assistance to wounded civilians. Mr. Vyshinsky proposes to exclude all those who assisted in any manner. Under such language those merely present in any occupied area forced by necessity of survival to perform any form of work or service within the German economy would be considered to have assisted the enemy and would thus be excluded. This would result in cruel hardship on many. We can, however, discuss the point at greater length later.

I sincerely regret having to speak in opposition to some of Mr. Vyshinsky's views. But he will recall that in London there were some things which because of the fundamental beliefs I hold, I had to stand on. I felt strongly about them then and I still do. This does not mean that Mr. Vyshinsky cannot hold to his basic beliefs as well and still achieve with us a solution. This solution can be reached if we are both willing in these fields to try for a spirit of cooperation and a realistic approach to our problems. It is essential to the peace of the world that we wipe out some of our resentments as well as our fears. I hope that as time goes on our two great nations may grow to understand each other and to accept our different viewpoints on certain questions.

APPENDIX F

**THE FUTURE OF DISPLACED PERSONS IN
EUROPE****DEPT STATE BULL. VOL. XVIII, NO. 419,
JULY 13, 1947, PP. 86-88****STATEMENT BY LT. COL. JERRY M. SAGE¹**

On my return to Europe in 1946, I learned that of the about 8,000,000 displaced persons that the German armies had forced into Germany from other countries of Europe which they had occupied, approximately 7,000,000 had returned, with the aid of the Western Allied Armies, to the areas in which they formerly lived. In the zones of the Western Allies in Germany, Austria, and Italy, there were at the first of this year slightly over a million displaced persons in the hands of the Western Allied Armies. Between 80 and 90 percent of these had been forced into German territory by the Nazi armies before the end of hostilities. The balance were persecutees, for the most part the Jewish people who fled into our zones in Austria and Germany, almost entirely from Poland, in 1946. This movement was greatly accelerated by the murder of 40 Jews at Kielce on July 4, 1946.

At this point I should like to clarify a misapprehension which has arisen in previous discussions of this bill. It has been erroneously stated that 80 percent of the DP's entered the occupied zones after the end of hostilities. As I have indicated above, the true situation is exactly the reverse. I do not know how this misapprehension came about. It may

¹ Excerpts from statement made on July 2, 1947, before the House Subcommittee on Immigration and Naturalization, and released to the press on the same date. Lieutenant Colonel Sage of the United States Army is attached to Headquarters of European Command, Frankfurt, Germany.

possibly stem from the fact that millions of Germans and persons of German ethnic origin ("Volksdeutsch") have fled or been transferred into the western zones of Germany from eastern Germany or from eastern European countries where they formerly resided. It is not with these people that we are concerned as they are Germans and have become a part of the German economy.

Of the million displaced persons remaining, Lithuanians, Latvians, Estonians, Poles, Jews, Yugoslavs, Ukrainians, and stateless persons, of whom we are talking here now, the United States has control of about 600,000 in Germany, Austria, and Italy. Of this number I have been vitally concerned with those residing in the U.S. zone of Germany, a total of over 500,000. When I left Germany a month ago, there were 354,000 of these displaced persons in assembly centers in our zone and about 150,000 living outside centers, either in labor units working for the U.S. Army or working in the German economy.

The United States Army has been charged with the responsibility for this group of half a million people. We have endeavored, with the assistance of UNRRA workers, to feed, clothe, and rehabilitate these people to the best of our ability and resources.

But we are continually asked one question and it is one we continually ask ourselves: "What is to become of these people—the ones our Army took under its control and still has under its control?"

The four alternative solutions presented by General Hilldring are not new. They have been discussed, considered, and elaborated on around our conference tables in Germany for many months. But the United States Army in Germany, although charged with the responsibility for displaced persons within American zones, cannot make the

decision as to what we are to do with these people in the future. That decision, we are fully aware, must be made by the United States Government—by the Congress—the ultimate governmental authority over them.

There are four possible alternatives:

1. Forcible repatriation.
2. Closing the camps and telling the displaced persons to become Germans and fend for themselves as best they can in Germany.
3. Continuing to maintain them separate from the political and economic organization in Europe, indefinitely, in the little communities which they form in the assembly centers.
4. Endeavoring to secure their resettlement in countries where they can rebuild their lives and strike new roots.

All I am here for is to give you briefly such of my observations of these people as you might feel to be useful to you in reaching your decision as to which of these alternative courses is to be pursued.

I shall endeavor to answer any questions which occur to you and to develop more fully any aspect that you may desire.

Repatriation

The alternative of repatriation must, at this point, be definitely termed "forcible repatriation". As has just been pointed out, a tremendous job has been done in returning 7,000,000 persons to their homelands. Over the past two years every opportunity has been afforded to those now remaining in our zones to return. From my observation, those whom we still have on our hands are essentially a hard core of nonrepatriables who will not return to their place of

origin because the map of the area where they formerly lived has been redrawn and a government alien to them is in power. They fear a lack of political freedom and have a real dread of persecution. I can certainly testify as to the presence of those fears. It is not unusual in the United States zone of Germany, when a movement of displaced persons is contemplated from one installation to another for better accommodations or to meet a military exigency, that rumors immediately begin to circulate about the camp, and the fear is developed that transportation is coming to repatriate the displaced persons against their will. On several occasions it has been part of my job to visit such installations to quiet the panic among the people by giving them the true facts about the movement and reiterating that it has not been and is not the policy of the United States Government to force displaced persons to return to the area from which they came. There are still a few people who are accepting our continuing offer to aid those who are willing to go. They receive, when they reach their destination, a two months' ration to insure their subsistence until they get their feet on the ground and become reestablished. Those who have gone during the last year and those who may still be willing to go are mainly Poles who came from that part of Poland which is still Poland. But the vast majority of displaced persons now in our hands have convinced me that they will not go back. I cannot number the occasions on which I have asked every variety of DP, "Why don't you go home—to the piece of ground you know, the members of your family and old friends, to the place where you can use your native tongue?"

These are the answers I receive, and I receive them every day from people of nearly every walk of life. The Baltic peoples—the Lithuanians, Latvians, and Estonians—have said to me, "I would rather die than return to my home—it is no longer mine. It is in the hands of the same people who took away every right I had in 1940 and 1941

and who took away friends and relatives of mine whom I never saw again."

Many of the Poles and Ukrainians who formerly lived in Poland east of the Curzon Line, now Poland no longer, say, "I will not return to land now held by the U. S. S. R."

The Jews in our camps tell me: "The Nazi teachings were far reaching. I am still attacked in eastern Europe, as well as in Germany. Let me go to Palestine."

I recall a remark by a Yugoslav DP who was in the same prison camp with me in 1943. "Should I go home to a political regime I hate and fear—to be tried by Tito, who accuses me of being a collaborator during the time I was spending two years and 50 pounds of flesh in German prison camps? The only one with whom I could have collaborated was God!"

Such observations, multiplied hundreds of times, are heard not only by me, but by every person who works with displaced persons in our zone. It does not do any good to say to these people that "7,000,000 displaced persons have gone back to where they came from: why don't you?" The answer is too simple and too clear. Naturally, the millions of French and other western Europeans went back home. Naturally, the millions of Russians who believed in the Russian economic and governmental system went back. Naturally, also, anyone who believed in or was indifferent about the new systems of government in other eastern areas went back. The ones who have gone were the ones who were willing to go. Their experience is no guide for those who are now unwilling to go. Is it reasonable to expect the DP Balts, for example, who are bitterly hostile to the political and economic system which they experienced in 1940 and 1941 and which now rigidly controls their countries, to feel that it is safe for them to go back, carrying their hostility with them,

to work against Communism? The very fact that they go back *unwillingly* is enough to endanger them. Or are we to expect and demand of them that, because their native countries have changed hands, they must therefore change their beliefs and accept Communism as their way of life? We believe that these persons unwilling to go back would have to be rounded up by the U.S. constabulary or German police and forced into repatriation trains with gun and bayonet.

Shall We Close the Camps?

The second alternative is to close the camps and tell the displaced persons that they should become Germans and get such work or relief as the Germans might provide. From my contacts with these people I have observed several aspects of this alternative which you gentlemen may wish to consider in determining what course to choose. The first is that the great body of these people would regard it as a return to imprisonment to be turned back to the Germans whose armies brought them into Germany for forced labor or into prisoner-of-war or concentration camps. It has been equally apparent from my contacts that the Germans do not want the displaced persons in their midst. The Germans have not forgotten the Nazi indoctrination which looked on the non-German as an inferior person to be exploited by the "master race". This feeling appears as one of our difficulties in finding employment for displaced persons. Too often the German administrator of a labor office discriminates against the displaced-person applicant, at least by passive if not active means. These ingrained antagonisms would be a perpetual source of conflict. They would prolong and make more burdensome our task in the occupation of Germany.

In addition to these deep-rooted antagonisms, there are factors in the economy of the western zone of Germany, as we over there observe it, which also have a definite bearing on the practicability of this second alternative. There are

slightly over 500,000 displaced persons in the U.S. zone of Germany alone. Can we expect the economy of the zone to absorb this half-million? Before the war, this area contained about 14 million people. In addition to that population we have had to accept 1½ million expellees (ethnic Germans) from eastern countries such as Czechoslovakia, Hungary, and Poland. Another million people have been added to the German economy in our zone under the classification of German refugees—Germans displaced from their homes in either the Russian zone or in the area presently under Polish administration. Thus, excluding the displaced persons, the total population of our zone has now been brought to about 16½ million. When one considers that at least 30 percent of the housing in the U.S. zone has been destroyed and its industries for the most part destroyed or collapsed; that even before the war, under the extreme food-production efforts of the Nazis, this area had to import 20 percent of its food requirements for a normal population of 14 million; that 2½ million Germans have been added to the area; and that it is also supposed to feed a million persons in the U.S. sector of Berlin, the reason why American taxpayers have the alternative of contributing heavily to the support of this surplus German population or letting it starve is apparent. Merely to close the camps and add these half-million non-Germans to the already surplus Germans in our area would give us only an apparent but no real relief from the situation we created when we conquered Germany and took these victims of Germany into our hands.

APPENDIX G

22 C.F.R. 61.313.(i)(c) SUPP. 1946

(j) *First-priority nonpreference class.* The first-priority nonpreference category of quota immigrants shall consist of the following:

(a) Aliens who have served honorably in the armed forces of the United States, and the alien widows, parents, unmarried minor children, and unmarried minor stepchildren of citizens of the United States (including deceased citizens) who have so served, and aliens who have served honorably as seamen for at least one year on vessels of countries of the United Nations engaged in sailing from ports in the United States, the service in either case having occurred during the period of the war that began on September 1, 1939, such persons not having voluntarily abandoned such service or occupation so long as they were not physically incapacitated for such service.

(b) Aliens who have been recommended by the Joint Chiefs of Staff as persons whose admission is highly desirable in the national interest, provided that such cases have been approved by all appropriate governmental agencies.

(c) Displaced persons covered by the President's directive of December 22, 1945 and his directive of October 31, 1946.

Aliens in the first-priority nonpreference class shall have their applications for nonpreference-quota immigration visas considered only after consideration shall have been given to the applications of all first-preference and second-preference immigrants awaiting visas. Aliens in the first-priority nonpreference-quota category shall have their

applications for visas considered in the order in which their registration forms were properly filled out and received at the consular office, but consideration need not be given to the visa application of any alien in this category unless a quota number is likely to be available for use in issuing a visa to him. [Subdivision (i) amended by Dept. Reg. 108.34, Dec. 14, 1946, effective Dec. 24, 1946, 11 F.R. 14611]

APPENDIX H

DEPT STATE BULL. VOL. XVI., NO. 401,
MARCH 9, 1947, PP. 423-429

U.S. Participation in International Refugee Organization

**THE PRESIDENT'S RECOMMENDATION
TO THE CONGRESS¹**

To the Congress of the United States of America:

I recommend that the Congress authorize the United States to participate as a member of the International Refugee Organization.

As an aftermath of the war, there are more than one million displaced persons remaining in Germany, Austria, and Italy. Almost two thirds of these are under United States care and control. The Allied military victory over the Axis Powers brought with it a practical and moral responsibility with reference to these victims of the Axis.

The General Assembly of the United Nations has considered the problem of these displaced persons carefully and at great length. At the first session in London, certain basic principles were established. It was agreed that this problem is international in scope and nature; that every effort should be made to facilitate the repatriation of displaced persons who desire to return to their homelands; that displaced persons who have valid objections to return should not be forced to do so, but should be cared for by an international agency until new homes can be found for them elsewhere. Between the January and October sessions of the General Assembly, the Economic and Social Council made a detailed study of the entire problem and recommended the establishment of

¹ Released to the press by the White House Feb. 24, 1947.

an International Refugee Organization which would provide an integrated and effective solution. At the meeting of the General Assembly in New York which ended in December, the draft constitution recommended by the Economic and Social Council was adopted. The United States Representative to the United Nations, Senator Warren Austin, signed the constitution of the International Refugee Organization subject to subsequent approval by the Congress.

This constitution represents an earnest effort by the United Nations to solve one of the most poignant and difficult problems left in the wake of the war. The organization to be created will have no governmental powers. It can in no way alter the statutes of any of its members. It can obtain funds only by appropriations by the constitutional processes of its members. It will be solely a service organization to aid in the solution of a common problem. I am confident that with the full support of the United States the International Refugee Organization will demonstrate the practical effectiveness of cooperation and understanding among nations. The participation of this Nation in the Organization was proposed in my budget message for the fiscal year 1948, and provision was made for the necessary funds within the proposed budget.

With respect to those displaced persons in our own areas of occupation, the United States Army has an excellent record of performance in a field which is not traditionally the responsibility of soldiers. The Army from the first recognized the need for making the maximum use of international civilian agencies, and has done so. With the forthcoming termination of the supply of civilian personnel from other organizations now used in the care and supply of displaced persons, I believe that it is of the utmost importance that the International Refugee Organization be established as soon as possible. It would indeed be serious if it

were not in a position to begin operations on July 1 of this year.

It is not unreasonable that many of the other potential members of the International Refugee Organization should watch closely the attitude of the United States before making their own definite commitments. I feel sure that with the firm and prompt leadership of the United States, this organization will be in a position to function as an international body to perform an essentially international service.

HARRY S. TRUMAN

THE WHITE HOUSE

February 24, 1947

Congressional Hearings on IRO Constitution

**LETTER FROM THE SECRETARY OF STATE TO
SENATOR VANDENBERG¹**

February 24, 1947

DEAR SENATOR VANDERBERG:

I would be grateful if you would bring to the attention of the Committee on Foreign Relations the following remarks pertaining to S.J. Res. 77, a bill to authorize U.S. membership in the International Refugee Organization. I regret that the intensive preparations required for the forthcoming meeting of the Council of Foreign Ministers in Moscow make it impossible for me to present these views in person.

At the climax of the war in Europe, on April 20, 1945, to be exact, I transmitted to the leaders of the Congress an

¹ Released to the press Mar. 1, 1947. Senator Vandenberg is Chairman of the Senate Committee on Foreign Relations.

urgent message from the Supreme Commander of the Allied Expeditionary Force. In that message General Eisenhower referred to the "unspeakable conditions" found in the concentration camps then being liberated by our advancing armies. He invited the Congressional leaders to make a flying trip to Germany to see for themselves the "full evidence of the cruelty practiced by the Nazis in such places as normal procedure."

With a deep sense of responsibility, a bi-partisan committee of twelve Senators and Representatives dropped their current business and departed by air for Germany. They saw for themselves; and through their eyes, the whole country saw too. The report of this joint committee, signed by all twelve members, ranks in my opinion as an historic document. It described vividly the tragic plight of those who were victimized by the Nazis. It recorded firm determination to do every thing possible to right the appalling wrongs perpetrated by the enemy. It was a moral mandate, to soldier and civilian alike, to exert every effort to help these unfortunate people.

Almost two years have elapsed since that joint Congressional report. More than 3½ million of our soldiers have been returned from the European battleground. Seven million displaced persons have been assisted to return to their homes from areas under the control of the Western Allied Armies. Many of the German war criminals responsible for the suffering and dislocation of these people have been tried and punished. However, some of the victims of Nazi concentration camps are still in displaced persons centers in our Occupied Areas. We also have many others who, although not actually confined in concentration camps, had been uprooted from their homes by the Nazis and brought to Germany for forced labor. They are still there. Why? Because we will not force them back against their will to the

countries from which they were uprooted; and because they have not yet been resettled elsewhere. We are now faced with this pressing question: What is to happen to these people?

My distinguished predecessor, Mr. Byrnes, established the policy that the future care and disposition of these displaced persons is a collective international responsibility just as was the military defeat of Germany and the punishment of Nazi war criminals. This policy was determined and supported without regard to differences of political affiliation. With your approval and assistance, I intend to continue that policy.

In furtherance of this policy the United States has actively supported in the United Nations the formation of an International Refugee Organization. As you know, Senator Austin, acting under authority of full powers issued by the President, has signed the constitution of the IRO, subject to final approval by Congress. The purpose of this Organization is to enable displaced persons to subsist while it actively effects their repatriation or resettlement. This will relieve the Army of its part of the present divided and difficult responsibility and should mean immediate economy of effort and funds and a speedier solution of the whole problem.

I have asked the Secretary of War, the Under Secretary of State and the Assistant Secretary of State for Occupied Areas to describe in more detail the nature of the present problem and the projected scope of activities of the new International Refugee Organization. In advance of their testimony, I would earnestly stress that, with whatever minor imperfections there may be as the inevitable product of reconciling many conflicting viewpoints, I believe that the IRO will advance this problem to its permanent solution. I therefore urge as an important element of our foreign policy

that the Congress support the efforts we have made thus far by authorizing the United States to participate in this Organization. I am confident that the Congress will approach this situation with the same deep sense of responsibility that it acted upon General Eisenhower's urgent message almost two years ago.

Faithfully yours,

GEORGE C. MARSHALL

Secretary of State

STATEMENT BY UNDER SECRETARY ACHESON¹

Mr. Chairman, I appreciate the opportunity which your Committee has given to the representatives of the Department of State to appear before you for the purpose of supporting Senate Joint Resolution 77, to provide for the United States membership in the International Refugee Organization.

The provisions of this bill can be simply stated. First, it authorizes the President to accept membership in the International Refugee Organization. Second, it provides that the President shall designate United States representatives and alternates to attend sessions of the International Refugee Organization. Third, it authorizes an appropriation of the sums necessary for the United States to participate in the organization. Essentially what this bill asks, therefore, is congressional authorization which will make definitive the action already taken by Senator Austin in signing provisionally the constitution of the International Refugee Organization.

¹ Opening statement made before the Senate Committee on Foreign Relations at hearings of that committee on the IRO on Mar. 1, 1947, and released to the press on the same date.

What is it that this constitution provides? It establishes an organization to deal on an integrated basis with the whole problem of refugees and displaced persons. For the purposes of this organization, a displaced person is someone who had to leave his own country as a result of the actions of the Nazi or Fascist authorities. A refugee is, generally speaking, anyone outside of his own country who was either a victim of Nazi persecution or who now is unwilling to return to his own country as a result of events which took place subsequent to the outbreak of the war. In general, the organization concerns itself with such people only when certain conditions are fulfilled, i. e., that such persons desire to be repatriated and need help in order to be repatriated or for good reasons refuse to return voluntarily to their own countries. These are primarily the people whom the occupying armies found on their hands when they entered Germany, Austria, and Italy. They were people who had been taken against their will to Germany during the war, largely for the purpose of slave labor, or were people who, through fear of persecution or through lack of sympathy with the regimes which have been established in their own countries, fled to Germany, Austria, or Italy for protection. The organization will also be concerned with similar problems in the Far East, particularly with overseas Chinese displaced by operations of the Japanese armies.

Toward all these people the organization is intended to carry out certain functions. In the first place, obviously they must be cared for until some permanent disposition can be made of their case. In the second place, then, it is desirable that as many of these people as possible should be repatriated to their own countries since, always provided they are willing to go back, this solution represents the most economical and permanently satisfying way of handling the matter. Finally, those who have valid objections to returning to their own countries must be resettled in another place. Only to a

limited extent could they be absorbed into the German economy. For example, in our zone in Germany, as a result of the expulsion of Germans from other countries and areas, there are three million more people than before the war while opportunities for work have been narrowed by the destruction of industrial plants. Nor should these victims of the Germans be forced against their will to become a part of them. It is of the highest importance that they should be brought as speedily as practical to useful living in a community where they are needed and wanted.

There are certain additional limitations upon the classes of people which this organization will serve. A person, for example, who has unreasonably refused to accept the proposals of the organization for resettlement will cease to be its concern. Also, the organization will not assist a person who is making no substantial effort toward earning his own living if it is possible for him to do so. Lastly, the organization will naturally not concern itself with war criminals, quislings, or traitors, or any other persons who can be shown to have assisted the enemy forces voluntarily in their operations against the United Nations.

Membership in the International Refugee Organization is open to any member of the United Nations and under certain restrictions to certain non-members. The General Council is the policy-making body of the organization, in which each member is represented and in which each member has one vote. The Executive Committee is elected by the General Council and is composed of nine countries elected for a two-year term. The chief administrative officer of the International Refugee Organization is the Director General, who will be appointed by the General Council upon the nomination of the Executive Committee and will himself appoint the administrative staff of the organization. The personnel of the organization is calculated in the budget as

running somewhere between 2,000 and 3,000 persons, which will represent the number of persons required to carry on the field work and camp administrative functions that are now being performed by UNRRA and the occupying armies.

The financing of the International Refugee Organization will be based upon article 10 of the constitution. In the first place, there will be an annual administrative budget which the General Assembly has set at a figure of \$4,800,000 for the first financial year of the organization. Second, the main work of the organization is derived from the funds expended under the operational budget. It was set by the General Assembly at about \$151,000,000 for the first financial year of the organization. The largest part of this is obviously that devoted to care and maintenance, which is approximately \$100,000,000, or two thirds of the budget. However, it is clear that the more quickly we can get the displaced persons repatriated or resettled in other countries, the more quickly we shall be able to reduce the care and maintenance items in the budget by removing these people from assembly centers and camps. It was therefore important to make adequate provision for the expenses of repatriation and resettlement.

The two parts of the budget just mentioned constitute the obligatory portion of the financing of the International Refugee Organization. In addition to these two parts, there is also set up a sum of \$5,000,000 for what is described as a fund for large-scale resettlement, to which contributions are not obligatory upon the members.

The apportionment of the budget among the members was naturally something to which a great deal of thought was given. It had been agreed from the start that the administrative budget should be apportioned on the same scale as the apportionment of the budget of the United Nations. According to this, therefore, the United States emerges with

an obligation to pay 39.89 percent of the administrative budget of the International Refugee Organization. The operational budget, it was felt, should reflect a little more closely the interest of the different countries in the problem. Certain adjustments were also made in favor of countries which had suffered severe economic and financial damage as a result of the war. The United States share in the operational budget on a full membership basis is 45.75 percent. The United States has substantially 60 percent of the displaced persons actually on its hands and has been actually making a higher percentage of external contributions to the cost of their care.

It has of course always been recognized that, so far as the United States is concerned, the Congress is the appropriating authority and that any obligation undertaken by the United States to contribute would have to be made annually subject to the appropriating authority of Congress. As to the large-scale resettlement expenditures for which no allocation of percentage is made by the constitution, the Department of State suggests that the share of the United States in this non-obligatory budget could equitably be fixed at the same percentage as the United States share of the regular operational budget, 45.75 percent.

The International Refugee Organization is to be a temporary organization. Its work should be brought to a close within a few years. There is a large job to be done but the very nature of the problem and the burden of delay both on the United States taxpayer and on the displaced persons themselves make it imperative that it be rapidly accomplished. Any member may at any time give written notice of its intention to withdraw. The withdrawal then becomes effective one year after the notice has been given.

The International Refugee Organization is a service organization. It is not an organization with governmental-

powers. Nothing in the constitution of this organization would enable it to alter the statutes of any of its members, whether in respect of immigration or any other matter. Furthermore, as I have stated above, the organization can obtain from the United States only such funds as the Congress may appropriate to the organization.

The constitution which has been described is the result of many months of earnest deliberation in the United Nations. Within a few months after the termination of hostilities in August 1945 it became evident that the task to be faced was one which required the unification of functions with regard to the care, repatriation, and resettlement of displaced persons that were being carried on at that time by the American, British, and French military governments as well as by UNRRA and the Intergovernmental Committee on Refugees. The question of refugees and displaced persons was accordingly placed on the agenda of the General Assembly which met in London in January 1946. The question was recognized by the delegates gathered at London as one of the substantive problems of great urgency which the United Nations had to face.

The Assembly itself, faced with the immediate pressure of organizing the United Nations, could not make any systematic examination of the matter. It therefore referred the matter to the Economic and Social Council, which, after a long series of deliberations and sub-referrals to committees, reported back to the Assembly in October a proposal for an International Refugee Organization. After a considerable debate, the Assembly, on December 15, 1946, adopted the constitution of the proposed organization, approved a budget for the first financial year, and approved also an agreement for a Preparatory Commission to undertake necessary planning functions during the interim period before the coming into force of the constitution. At every point

throughout the debate, the urgency and importance of the question was evident. And to this question, I may add, more hours have been devoted in the United Nations than to any other single question exclusive of those concerning security.

The constitution was opened for signature on December 15, 1946. The constitution requires two conditions to bring it into force: (1) at least 15 states must become parties to it; (2) the allocated contributions of the participating states must constitute 75 percent of the total operational budget.

At the present time, 11 states are already signatories to the constitution. They are: Canada, the United States, France, the Dominican Republic, Honduras, Guatemala, the Philippines, Liberia, the Netherlands, Norway, and the United Kingdom. The allocated contributions of these states amount to 69.80 percent of the budget. Of these states, only the United Kingdom has as yet signed definitively without reservations similar to that of the United States.

Signature was made on behalf of the United States by Senator Austin "subject to approval". In this context, "approval" is understood to mean approval by the Congress. The joint resolution now before you will, if enacted, authorize the President to accept definitively for the United States membership in the organization. Favorable action by the United States will of course affect governments which are now looking to us to take the lead.

Since the action by the General Assembly, the Preparatory Commission of the IRO has met in Geneva, Switzerland, where preliminary plans have been made for the program of the IRO as and when it is legally established. The Commission elected as its Executive Secretary Mr. Arthur J. Altmeyer, who is the Commissioner of the United States Social Security Administration. Mr. Altmeyer will

thus have the administrative responsibility, as an international civil servant, for the next several months, of initiating the plans for the effectuation of the IRO.

The origin of the problem of the displaced persons is, I am sure, familiar to most of you. The great majority of these people were driven from their homes by the circumstances of the war. These were nationals of one or another of the United Nations or were persons who had been persecuted by the enemy. In very large part, they were people who had been carried into Germany as slave labor. When the war ended, they were without the means of repatriating themselves or of providing adequately for their own maintenance. In Germany, Austria, and Italy, the occupying western armies found some eight millions of homeless people sturdy enough to have survived, who became the joint concern of the occupying armies and of UNRRA.

There was then undertaken by the armies and UNRRA an extraordinarily effective job of identification, care and repatriation. Seven million people were returned to their homes within a year. This was a rapid job planned and instituted as a joint activity by SHAEF. It was also humanely accomplished. It was from all points of view the most satisfactory method of dealing with the problem. But it fell short of becoming a complete solution. There remained more than a million displaced persons on the hands of the United States, Great Britain, and France in Germany, Austria and Italy. The process of repatriation, though still continuing, has slowed up.

It is evident that there are, among the displaced persons, hundreds of thousands who will not voluntarily return to their places of origin. This is due to the changes wrought by the war in pre-war governmental boundaries and governmental systems within the areas from which they have come; to the aftermath of the memories of Nazi persecution in

those areas during the war, the destruction of their kindred and their former homes and former opportunities for livelihood; to differences in political views and fears of persecution or reprisal because of those differences. We are unwilling, if we were able, forcibly to send these uprooted people back to countries with new borders and new political systems. That has been the cardinal principle in handling these displaced persons in the past. It was approved by the General Assembly of the United Nations. It is firmly embodied in the constitution of the International Refugee Organization.

It has also been a firm principle in the administration of the displaced persons program, and it will continue to be under the International Refugee Organization, that these victims of German aggression will not against their will be forced to stay in Germany and become Germans. As a matter of fact, there is no place for them in the contracted German economy and in our already overcrowded zone.

It has always been the view of the military authorities that the problem of displaced persons was from its very nature one not for troops but for international civilian agencies. They have increasingly used such agencies. Our Army is not now staffed to carry on the task of administration of these hundreds of communities and the negotiation and execution of international arrangements for repatriation and resettlement. The International Refugee Organization provides a unified service for all the present varied services with the present diffused overheads and responsibilities.

The problem, then, is that of the remaining displaced persons, about one million people, of whom some 600,000 are in the United States zone.

Of these people, almost all come from the countries of eastern Europe. Perhaps a third are registered as Poles, a

fifth as Balts, a fourth as Jews, and smaller fractions as Yugoslavs and citizens of the Soviet Union, stateless, and of miscellaneous origin. We are thus dealing with a group of people originating in an area of Europe where political change has been great and where political tension is high. As an occupying power, we have these people on our hands; we are compelled to do something about them in a constructive and statesmanlike manner.

The program which is envisaged for these people is in summary as follows: First, the persons who can be repatriated must be temporarily cared for until their return home can be accomplished. They must receive initial supplies of food to start them on their way. Second, those who are unwilling to return need temporary care until they can be resettled. Third, the task of resettlement requires protracted negotiation with the potential countries of reception and then the making of arrangements for sorting out, training, medical examination, and transportation. Finally, such displaced persons as are unwilling to work to contribute to their own support or who are otherwise exploiting the assistance they are receiving, or have been collaborators with our enemies, or are unwilling to accept opportunities for resettlement, will no longer receive support. This recital of the tasks before the IRO will indicate, I think, the difficult program facing the organization. This Government has never believed that the job would be easy; but it has always been determined to see it through.

The International Refugee Organization has a substantial contribution to make to the cause of post-war reconstruction and international cooperation. Our participation in it would be a further earnest of our determined effort to make the United Nations work.

APPENDIX I

**UNRRA ORDER NO. 52,
ELIGIBILITY FOR U.N. ASSISTANCE,
JUNE 24, 1946, U.N. PAG-4/4.2-82
U.N.R.R.A. CENTRAL HEADQUARTERS
D.P. OPERATIONS, GERMANY
ORDER NO. 52**

24th June, 1946.

Subject: Eligibility for UNRRA Assistance

1. Purpose.

a. This order rescinds Administrative Order No. 29, dated 4th March, 1946 subject: Categories of Displaced Persons.

b. One of UNRRA's fundamental responsibilities is to ensure that only those persons eligible for assistance under UNRRA Council Resolutions and implementing administrative decisions receive UNRRA care.

c. The purpose of this order is to re-state the eligibility requirements for UNRRA assistance, and to define the various categories of displaced persons for whom UNRRA is authorized to give care, as well as those categories of displaced persons who are ineligible for care.

2. Applicability.

The eligibility requirements set forth herein apply to all new applicants for UNRRA assistance, as well as to those displaced persons now receiving UNRRA care.

3. Effective Date.

This order will come into effect forthwith.

4. Policy.

a. The determination of eligibility for UNRRA care is the responsibility of UNRRA staff and not of the military

in each Zone of Occupation, except for the screening of war criminals, collaborators or traitors, which is a military responsibility.

b. Eligibility for UNRRA care shall be a matter for continuous review by UNRRA staff at all echelons.

c. Only those new applicants who meet the eligibility requirements stated herein shall receive UNRRA care.

d. Those persons found to be ineligible after review shall be denied UNRRA assistance in accordance with the procedure as established in this order.

5. Categories of Displaced Persons Eligible for UNRRA Care.

a. *United Nations nationals* who have been displaced as a result of the war from their countries of origin, citizenship, or previous residence.

(1) The date of displacement must have been on or after 1 September 1939 and prior to the cessation of hostilities, except for Czech nationals displaced after 14 March 1939, who are eligible.

(2) Examples:

(a) *United Nations nationals* of the following countries who meet the requirements of Sections 5a

and 5a(1) above are considered *prima facie* to be eligible, except insofar as they are in categories 6a, b, c and f below:

Albania	Byelorussian S.S.R.
Belgium	Luxembourg
Czechoslovakia	The Netherlands
Denmark	Norway
France	Poland
Greece	U.S.S.R.
Yugoslavia	Ukrainian S.S.R.
	and
Former residents of Estonia, Latvia and Lithuania.	

b *Persecutees*. Persons persecuted by the enemy because of their race, religion, or activities in favor of the United Nations. Persons in this category are eligible for UNRRA care *irrespective of the date they left their country or place of previous residence*, including those normally resident in Germany, whether or not displaced as a result of the war.

c. *Stateless Persons*, who have been driven, as a result of the war, from their previous places of settled residence.

(1) This category includes:

(a) Holders of Nansen passports;

(b) Persons who have been deprived of their nationality by decision of the government of their country, and who have not acquired a new nationality.

(2) The date of displacement must have been on or after 1 September, 1939, and prior to the cessation of hostilities.

d. *Miscellaneous Groups*.

(1) Italian nationals displaced as a result of the war on or after 1 September, 1939, and prior to the cessation of hostilities, and not normally resident in Germany.

(2) Allied Prisoners of War (RAMPS) who have lost their POW status, providing the military certifies that they do not fall within 6a, b and c below.

(3) All displaced persons originally eligible for UNRRA care who returned to Germany after having been repatriated.

6. Categories of Displaced Persons Not Eligible for UNRRA Care.

a. *United Nations nationals, stateless persons, and Italian nationals* who were not displaced as a result of the war, between 1 September 1939, and the cessation of hostilities, or who were normally resident in Germany and *internally* displaced as a result of the war.

b. *War criminals, collaborators, quislings or traitors*, of whatever race, nationality or religion.

c. *Enemy or ex-enemy nationals*, with the exception of those listed under 5b. Nationals of the following countries are enemy or ex-enemy nationals:

Austria	Japan
Bulgaria	Roumania
Germany	Siam
Hungary	

d. *Neutral nations nationals*, with the exception of those listed under paragraph 5b. Neutral nations are:

Afghanistan	Portugal
Eire	Spain
Finland	Sweden
Switzerland	

e. *So-called Volksdeutsche and German Balts.* Volksdeutsche are persons who, irrespective of their former nationality are, in fact, regarded as German citizens, both by their national authorities and by the occupying military authorities in the Zones where they are located. German Balts are citizens of the former Baltic republics (Latvia, Estonia, Lithuania) who are considered by the military authorities of the Zones where they are located as being, in fact, German citizens.

f. *Ex-Wehrmacht personnel* of whatever nationality or stateless, are ineligible unless individually certified by the military authorities as:

(i) Not a collaborator, war criminal, quisling or traitor;

(ii) Not a Volksdeutsche;

(iii) Having been completely discharged from military status;

(iv) Having entered the Wehrmacht involuntarily.

7. Special Category.

Nationals of the United Nations, as set forth below, are ineligible for UNRRA assistance unless they are persecutees or desire repatriation at this time. If repatriation is desired, UNRRA assistance will be provided.

Argentina	India
Australia	Iraq
Bolivia	Iran
Brazil	Lebanon
Canada	Liberia
Chile	Mexico
China	New Zealand
Colombia	Nicaragua
Costa Rica	Panama
Cuba	Paraguay
Dominican Republic	Peru
Ecuador	Philippine Islands
Egypt	Saudi Arabia
El Salvador	Syria
Ethiopia	Turkey
Guatemala	Union of South Africa
Haiti	United Kingdom
Honduras	U.S.A.
Iceland	Uruguay
	Venezuela

8. Procedure.

a. The Zone Director will communicate immediately with the military commander of the Zone and will advise him of the provisions of this order. The Military Commander will be requested to assist UNRRA in removing from camps individuals who are not eligible for UNRRA care. At the same time, the Military Commander will be assured of UNRRA assistance in removing from camps

individuals whom the military authorities determine to be war criminals, collaborators, quislings or traitors.

b. The Zone Director will notify this Headquarters promptly of the reply received from the Military Commander.

c. The Zone Director will bring this order to the attention of all UNRRA staff and will take full responsibility for its prompt execution, promulgating such additional implementing instructions as may be necessary.

d. The Zone Director will put into effect a plan for the controlled review of eligibility for UNRRA assistance of all persons now receiving care. He will establish the date by which the review of eligibility will be completed. District Directors and Field Supervisors will be instructed to make certain that the teams' review of eligibility progresses in accordance with a definite schedule, in order to ensure completion by the date established.

e. It will be the responsibility of the Zone Director to make certain that only those persons eligible for assistance receive UNRRA care.

f. The review of eligibility will include a careful examination of D.P. registration cards, and interview and re-interview with the displaced persons as necessary. All questionable cases of nationality must be referred to officially accredited liaison officers for determination, subject to review by the military authorities. This determination by the liaison officer must be rendered in writing.

g. The Zone Director will be responsible for submitting to appropriate military authorities, in writing, the names of those displaced persons found to be ineligible for UNRRA care as soon as their ineligibility is determined, with the request that they be removed from assembly centers if resident therein, or with the statement that they are ineligible for UNRRA assistance if they live outside assembly centers. The Zone Director will keep himself informed of the numbers of displaced persons found to be ineligible

and reported to the military authorities, the action taken by the military, and of difficulties arising in this respect.

(1) *Volksdeutsche*

(a) The National Liaison Officer of the Government of which the suspected Volksdeutsche were nationals will be consulted, and written statements will be obtained from this Liaison Officer as to whether they are regarded as being Volksdeutsche.

(b) Should the Liaison Officer confirm that the persons are to be considered as Volksdeutsche, the military authorities will be approached and requested to declare whether they likewise consider the persons as being Volksdeutsche.

(c) If the National Liaison Officer and the military authorities concur that they are to be considered as such, the military authorities will be requested to remove these persons from UNRRA assembly centers.

(d) The decision of the military authorities and of the Liaison Officer on the national status of persons suspected of being Volksdeutsche will be obtained in writing. No verbal statement is to be accepted.

h. (Reference CHQ Administrative Order 34, revised 18 May 1946) The Zone Director will include in his monthly Report to CHQ the progress of the eligibility review, the number of displaced persons who are found to be ineligible, and the action taken by the military to remove them from assembly centers. A separate statement should be made in the same report with respect to the displaced persons living outside centers.

F.E. MORGAN
Lieutenant General,
Chief of Operations,
Germany.

APPENDIX J**CONSTITUTION OF THE INTERNATIONAL
REFUGEE ORGANIZATION****PREAMBLE**

The Governments accepting this Constitution,

Recognizing:

that genuine refugees and displaced persons constitute an urgent problem which is international in scope and character;

that as regards displaced persons, the main task to be performed is to encourage and assist in every way possible their early return to their country of origin;

that genuine refugees and displaced persons should be assisted by international action, either to return to their countries of nationality or former habitual residence, or to find new homes elsewhere, under the conditions provided for in this Constitution; or in the case of Spanish Republicans, to establish themselves temporarily in order to enable them to return to Spain when the present Falangist regime is succeeded by a democratic regime;

that re-settlement and re-establishment of refugees and displaced persons be contemplated only in cases indicated clearly in the Constitution;

that genuine refugees and displaced persons, until such time as their repatriation or re-settlement and re-establishment is effectively completed, should be protected in their rights and legitimate interests, should receive care and assistance and, as far as possible, should be put to useful employment in order to avoid the evil and anti-social consequences of continued idleness; and

that the expenses of repatriation to the extent practicable should be charged to Germany and Japan for persons displaced by those Powers from countries occupied by them:

Have Agreed:

for the accomplishment of the foregoing purposes in the shortest possible time, to establish and do hereby establish, a non-permanent organization to be called the International Refugee Organization, a specialized agency to be brought into relationship with the United Nations, and accordingly

Have Accepted the Following Articles:

ARTICLE 1

MANDATE

The mandate of the Organization shall extend to refugees and displaced persons in accordance with the principles, definitions and conditions set forth in Annex I, which is attached to and made an integral part of this Constitution.

ARTICLE 2

FUNCTIONS AND POWERS

1. The functions of the Organization to be carried out in accordance with the purposes and the principles of the Charter of the United Nations, shall be: the repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement and re-establishment, in countries able and willing to receive them, of persons who are the concern of the Organization under the provisions of Annex I. Such functions shall be exercised with a view:

(a) to encouraging and assisting in every way possible the early return to their country of nationality, or former habitual residence, of those persons who are the concern of the Organization, having regard to the

principles laid down in the resolution on refugees and displaced persons adopted by the General Assembly of the United Nations on 12 February 1946 (Annex III) and to the principles set forth in the Preamble, and to promoting this by all possible means, in particular by providing them with material assistance, adequate food for a period of three months from the time of their departure from their present places of residence provided they are returning to a country suffering as a result of enemy occupation during the war, and provided such food shall be distributed under the auspices of the Organization; and the necessary clothing and means of transportation; and

(b) with respect to persons for whom repatriation does not take place under paragraph 1 (a) of this article to facilitating:

(i) their re-establishment in countries of temporary residence;

(ii) the emigration to, re-settlement and re-establishment in other countries of individuals or family units; and

(iii) as may be necessary and practicable, within available resources and subject to the relevant financial regulations, the investigation, promotion or execution of projects of group re-settlement or large-scale re-settlement.

(c) with respect to Spanish Republicans to assist them to establish themselves temporarily until the time when a democratic regime in Spain is established.

2. For the purpose of carrying out its functions, the Organization may engage in all appropriate activities, and to this end, shall have power:

(a) to receive and disburse private and public funds;

(b) as necessary to acquire land and buildings by lease, gift, or in exceptional circumstances only, by purchase; and to hold such land and buildings or to dispose of them by lease, sale or otherwise;

(c) to acquire, hold and convey other necessary property;

(d) to enter into contracts, and undertake obligations; including contracts with Governments or with occupation or control authorities, whereby such authorities would continue, or undertake, in part or in whole, the care and maintenance of refugees and displaced persons in territories under their authority, under the supervision of the Organization;

(e) to conduct negotiations and conclude agreements with Governments;

(f) to consult and co-operate with public and private organizations whenever it is deemed advisable, in so far as such organizations share the purpose of the Organization and observe the principles of the United Nations;

(g) to promote the conclusion of bilateral arrangements for mutual assistance in the repatriation of displaced persons, having regard to the principles laid down in paragraph (c) (ii) of the resolution adopted by the General Assembly of the United Nations on 12 February 1946 regarding the problem of refugees (Annex III);

(h) to appoint staff, subject to the provisions of Article 9 of this Constitution;

(i) to undertake any project appropriate to the accomplishment of the purposes of this Organization;

(j) to conclude agreements with countries able and willing to receive refugees and displaced persons for the purpose of ensuring the protection of their legitimate rights and interests in so far as this may be necessary; and

(k) in general, to perform any other legal act appropriate to its purposes.

ARTICLE 3

RELATIONSHIP TO THE UNITED NATIONS

The relationship between the Organization and the United Nations shall be established in an agreement between the Organization and the United Nations as provided in Articles 57 and 63 of the Charter of the United Nations.

ARTICLE 4

MEMBERSHIP

1. Membership in the Organization is open to Members of the United Nations. Membership is also open to any other peace-loving States, not members of the United Nations, upon recommendation of the Executive Committee, by a two-thirds majority vote of members of the General Council present and voting, subject to the conditions of the agreement between the Organization and the United Nations approved pursuant to article 3 of this Constitution.

2. Subject to the provisions of paragraph 1 of this article, the members of the Organization shall be those

States whose duly authorized representatives sign this Constitution without reservation as to subsequent acceptance, and those States which deposit with the Secretary-General of the United Nations their instruments of acceptance after their duly authorized representatives have signed this Constitution with such reservation.

3. Subject to the provisions of paragraph 1 of this article, those States, whose representatives have not signed the Constitution referred to in the previous paragraph, or which, having signed it, have not deposited the relevant instrument of acceptance within the following six months, may, however, be admitted as members of the Organization in the following cases:

(a) if they undertake to liquidate any outstanding contributions in accordance with the relevant scale; or

(b) if they submit to the Organization a plan for the admission to their territory, as immigrants, refugees or displaced persons in such numbers, and on such settlement conditions as shall, in the opinion of the Organization, require from the applicant State an expenditure or investment equivalent, or approximately equivalent, to the contribution that they would be called upon, in accordance with the relevant scale, to make to the budget of the Organization.

4. Those States which, on signing the Constitution, express their intention to avail themselves of clause (b) of paragraph 3 of this article may submit the plan referred to in that paragraph within the following three months, without prejudice to the presentation within six months of the relevant instrument of acceptance.

5. Members of the Organization which are suspended from the exercise of the rights and privileges of Membership of the United Nations shall, upon request of

the latter, be suspended from the rights and privileges of this Organization.

6. Members of the Organization which are expelled from the United Nations shall automatically cease to be members of this Organization.

7. With the approval of the General Assembly of the United Nations, members of the Organization which are not members of the United Nations, and which have persistently violated the principles of the Charter of the United Nations may be suspended from the rights and privileges of the Organization, or expelled from its membership by the General Council.

8. A member of the Organization which has persistently violated the principles contained in the present Constitution, may be suspended from the rights and privileges of the Organization by the General Council, and with the approval of the General Assembly of the United Nations, may be expelled from the Organization.

9. A member of the Organization undertakes to afford its general support to the work of the Organization.

10. Any member may at any time give written notice of withdrawal to the chairman of the Executive Committee. Such notice shall take effect one year after the date of its receipt by the Chairman of the Executive Committee.

ARTICLE 5

ORGANS

There are established as the principal organs of the Organization: a General Council, an Executive Committee and a Secretariat.

ARTICLE 6

THE GENERAL COUNCIL

1. The ultimate policy-making body of the Organization shall be the General Council in which each member shall have one representative and such alternates and advisers as may be necessary. Each member shall have one vote in the General Council.

2. The General Council shall be convened in regular session not less than once a year by the Executive Committee provided, however, that for three years after the Organization comes into being the General Council shall be convened in regular session not less than twice a year. It may be convened in special session whenever the Executive Committee shall deem necessary; and it shall be convened in special session by the Director General within thirty days after a request for such a special session is received by the Director-General from one-third of the members of the Council.

3. At the opening meeting of each session of the General Council, the Chairman of the Executive Committee shall preside until the General Council has elected one of its members as Chairman for the session.

4. The General Council shall thereupon proceed to elect from among its members a first Vice-Chairman and a second Vice-Chairman, and such other officers as it may deem necessary.

ARTICLE 7

EXECUTIVE COMMITTEE

1. The Executive Committee shall perform such functions as may be necessary to give effect to the policies of the General Council, and may make, between sessions of the General Council, policy decisions of an emergency nature

which it shall pass on to the Director-General, who shall be guided thereby, and shall report to the Executive Committee on the action which he has taken thereon. These decisions shall be subject to reconsideration by the General Council.

2. The Executive Committee of the General Council shall consist of the representatives of nine members of the Organization. Each member of the Executive Committee shall be elected for a two-year term by the General Council at a regular session of the Council. A member may continue to hold office on the Executive Committee during any such period as may intervene between the conclusion of its term of office and the first succeeding meeting of the General Council at which an election takes place. A member shall be at all times eligible for re-election to the Executive Committee. If a vacancy occurs in the membership of the Executive Committee between two sessions of the General Council, the Executive Committee may fill the vacancy by itself appointing another member to hold office until the next meeting of the Council.

3. The Executive Committee shall elect a Chairman and a Vice-Chairman from among its members, the terms of office to be determined by the General Council.

4. Meetings of the Executive Committee shall be convened:

(a) at the call of the Chairman, normally twice a month;

(b) whenever any representative of a member of the Executive Committee shall request the convening of a meeting, by a letter addressed to the Director-General, in which case the meeting shall be convened within seven days of the date of the receipt of the request;

(c) in the case of a vacancy occurring in the Chairmanship, the Director-General shall convene a meeting at which the first item on the agenda shall be the election of a Chairman.

5. The Executive Committee may, in order to investigate the situation in the field, either as a body or through a delegation of its members, visit camps, hostels or assembly points within the control of the Organization, and may give instructions to the Director-General in consequence of the reports of such visits.

6. The Executive Committee shall receive the reports of the Director-General as provided in paragraph 6 of article 8 of this Constitution, and, after consideration thereof, shall request the Director-General to transmit these reports to the General Council with such comments as the Executive Committee may consider appropriate. These reports and such comments shall be transmitted to all members of the General Council before its next regular session and shall be published. The Executive Committee may request the Director-General to submit such further reports as may be deemed necessary.

ARTICLE 8

ADMINISTRATION

1. The chief administrative officer of the Organization shall be the Director-General. He shall be responsible to the General Council and the Executive Committee and shall carry out the administrative and executive functions of the Organization in accordance with the decisions of the General Council and the Executive Committee, and shall report on the action taken thereon.

2. The Director-General shall be nominated by the Executive Committee and appointed by the General Council. If no person acceptable to the General Council is nominated by the Executive Committee, the General Council may proceed to appoint a person who has not been nominated by the Committee. When a vacancy occurs in the office of the Director-General the Executive Committee may appoint an Acting Director-General to assume all the duties and functions of the office until a Director-General can be appointed by the General Council.

3. The Director-General shall serve under a contract which shall be signed on behalf of the Organization by the Chairman of the Executive Committee and it shall be a clause of such contract that six months' notice of termination can be given on either side. In exceptional circumstances, the Executive Committee, subject to subsequent confirmation by the General Council, has the power to relieve the Director-General of his duties by a two-thirds majority vote of the members if, in the Committee's opinion, his conduct is such as to warrant such action.

4. The staff of the Organization shall be appointed by the Director-General under regulations to be established by the General Council.

5. The Director-General shall be present, or be represented by one of his subordinate officers, at all meetings of the General Council, or the Executive Committee and of all other committees and subcommittees. He or his representatives may participate in any such meeting but shall have no vote.

6. (a) The Director-General shall prepare at the end of each half-year period a report on the work on the Organization. The report prepared at the end of each alternate

period of six months shall relate to the work of the Organization during the preceding year and shall give a full account of the activities of the Organization during that period. These reports shall be submitted to the Executive Committee for consideration, and thereafter shall be transmitted to the General Council together with any comments of the Executive Committee thereon, as provided by paragraph 6 of article 7 of this Constitution.

(b) At every special session of the General Council the Director-General shall present a statement of the work of the Organization since the last meeting.

ARTICLE 9

STAFF

1. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. A further consideration in the employment of the staff shall be adherence to the principles laid down in the present Constitution. Due regard shall be paid to the importance of recruiting staff on an appropriate geographical basis, and of employing an adequate number of persons from the countries of origin of the displaced persons.

2. No person shall be employed by the Organization who is excluded under Part II, other than paragraph 5, of Annex I of this Constitution, from becoming the concern of the Organization.

3. In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action

which might reflect on their position as international officials responsible only to the Organization. Each member of the Organization undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities.

ARTICLE 10

FINANCE

1. The Director-General shall submit, through the Executive Committee, to the General Council an annual budget, covering the necessary administrative, operational and large-scale re-settlement expenditures of the Organization, and from time to time such supplementary budgets as may be required. The Executive Committee shall transmit the budget to the General Council with any remarks it may deem appropriate. Upon final approval of a budget by the General Council, the total under each of these three headings—to wit, “administrative”, “operational” and “large-scale re-settlement”—shall be allocated to the members in proportions for each heading to be determined from time to time by a two-thirds majority vote of the members of the General Council present and voting.

2. Contributions shall be payable, as a result of negotiations undertaken at the request of members between the Organization and such members, in kind or in such currency as may be provided for in a decision by the General Council, having regard to currencies in which the anticipated expenditure of the Organization will be effected from time to time, regardless of the currency in which the budget is expressed.

3. Each member undertakes to contribute to the Organization its share of the administrative expenses as

determined and allocated under paragraphs 1 and 2 of this article.

4. Each member shall contribute to the operational expenditures—except for large-scale re-settlement expenditures—as determined and allocated under paragraphs 1 and 2 of this article, subject to the requirements of the constitutional procedure of such members. The members undertake to contribute to the large-scale re-settlement expenditures on a voluntary basis and subject to the requirements of their constitutional procedure.

5. A member of the Organization, which, after the expiration of a period of three months following the date of the coming into force of this Constitution, has not paid its financial contribution to the Organization for the first financial year, shall have no vote in the General Council or the Executive Committee until such contribution has been paid.

6. Subject to the provisions of paragraph 5 of this article, a member of the Organization which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Council or the Executive Committee if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding one full year.

7. The General Council may, nevertheless, permit such members to vote if it is satisfied that the failure to pay is due to conditions beyond the control of such members.

8. The administrative budget of the Organization shall be submitted annually to the General Assembly of the United Nations for such review and recommendation as the General Assembly may deem appropriate. The agreement under which the Organization shall be brought into relationship with the United Nations under article 3 of this Constitution may provide, *inter alia*, for the approval of the

administrative budget of the Organization by the General Assembly of the United Nations.

9. Without prejudice to the provisions concerning supplementary budgets in paragraph 1 of this article, the following exceptional arrangements shall apply in respect of the financial year in which this Constitution comes into force:

(a) the budget shall be the provisional budget set forth in Annex II to this Constitution; and

(b) the amounts to be contributed by the members shall be in the proportions set forth in Annex II to his Constitution.

ARTICLE 11

HEADQUARTERS AND OTHER OFFICES

1. The Organization shall establish its headquarters at Paris or at Geneva, as the General Council shall decide, and all meetings of the General Council and the Executive Committee shall be held at this headquarters, unless a majority of the members of the General Council or the Executive Committee have agreed, at a previous meeting or by correspondence with the Director-General to meet elsewhere.

2. The Executive Committee may establish such regional and other offices and representations as may be necessary.

3. All offices and representations shall be established only with the consent of the Government in authority in the place of establishment.

ARTICLE 12

PROCEDURE

1. The General Council shall adopt its own rules of procedure, following in general, the rules of procedure of the Economic and Social Council of the United Nations, wherever appropriate, and with such modifications as the General Council shall deem desirable. The Executive Committee shall regulate its own procedure subject to any decisions of the General Council in respect thereto.

2. Unless otherwise provided in the Constitution or by action of the General Council, motions shall be carried by simple majority of the members present and voting in the General Council and the Executive Committee.

ARTICLE 13

STATUS, IMMUNITIES AND PRIVILEGES

1. The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its objectives.

2. (a) The Organization shall enjoy in the territory of each of its members such privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its objectives.

(b) Representatives of members, officials and administrative personnel of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. Such legal status, privileges and immunities shall be defined in an agreement to be prepared by the Organization after consultation with the Secretary-General of the United Nations. The agreement shall be open to accession by all members and shall continue in force as between the Organization and every member which accedes to the agreement.

ARTICLE 14

RELATIONS WITH OTHER ORGANIZATIONS

1. Subject to the provisions of the agreement to be negotiated with the United Nations, pursuant to article 3 of this Constitution, the Organization may establish such effective relationships as may be desirable with other international organizations.

2. The Organization may assume all or part of the functions, and acquire all or part of the resources, assets and liabilities of any intergovernmental organization or agency, the purposes and functions of which lie within the scope of the Organization. Such action may be taken either through mutually acceptable arrangements with the competent authorities of such organizations or agencies, or pursuant to authority conferred upon the Organization by international convention or agreement.

ARTICLE 15

RELATIONSHIP WITH AUTHORITIES OF COUNTRIES OF LOCATION OF REFUGEES AND DISPLACED PERSONS

The relationship of the Organization with the Governments or administrations of countries in which displaced persons or refugees are located, and the conditions under which it will operate in such countries, shall be determined by agreements to be negotiated by it with such Governments

or administrations in accordance with the terms of this Constitution.

ARTICLE 16

AMENDMENT OF CONSTITUTION

Texts of proposed amendments to this Constitution shall be communicated by the Director-General to members at least three months in advance of their consideration by the General Council. Amendments shall come into effect when adopted by a two-thirds majority of the members of the General Council present and voting and accepted by two-thirds of the members in accordance with their respective constitutional processes, provided, however, that amendments involving new obligations for members shall come into force in respect of each member only on acceptance by it.

ARTICLE 17

INTERPRETATION

1. The Chinese, English, French, Russian and Spanish texts of this Constitution shall be regarded as equally authentic.

2. Subject to Article 96 of the Charter of the United Nations and of Chapter II of the Statute of the International Court of Justice, any question or dispute concerning the interpretation or application of this Constitution shall be referred to the International Court of Justice, unless the General Council or the parties to such dispute agree to another mode of settlement.

ARTICLE 18

ENTRY INTO FORCE

1. (a) States may become parties to this Constitution by:

(i) signature without reservation as to approval;

(ii) signature subject to approval followed by acceptance;

(iii) acceptance.

(b) acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

2. This Constitution shall come into force when at least fifteen States, whose required contributions to Part I of the operational budget as set forth in Annex II of this Constitution amount to not less than seventy-five per cent of the total thereof, have become parties to it.

3. In accordance with Article 102 of the Charter of the United Nations, the Secretary-General, of the United Nations will register this Constitution, when it has been signed, without reservation as to approval, on behalf of one State or upon deposit of the first instrument of acceptance.

4. The Secretary-General of the United Nations will inform States parties to this Constitution, of the date when it has come into force; he will also inform them of the dates when other States have become parties to this Constitution.

IN FAITH WHEREOF the undersigned, duly authorized for that purpose, have signed this Constitution.

DONE at Flushing Meadow, New York, this fifteenth day of December, one thousand nine hundred and forty-six,

in a single copy in the Chinese, English, French, Russian and Spanish languages. The original texts shall be deposited in the archives of the United Nations. The Secretary-General of the United Nations will send certified copies of the texts to each of the signatory Governments and, upon the coming into force of the Constitution and the election of a Director-General, to the Director-General of the Organization.

ANNEX I

DEFINITIONS—GENERAL PRINCIPLES

1. The following general principles constitute an integral part of the definitions as laid down in Parts I and-II of this Annex.

(a) The main object of the Organization will be to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons, which shall be just and equitable to all concerned.

(b) The main task concerning displaced persons is to encourage and assist in every way possible their early return to their countries of origin, having regard to the principles laid down in paragraph (c)(ii) of the resolution adopted by the General Assembly of the United Nations on 12 February 1946 regarding the problem of refugees (Annex III).

(c) As laid down in the resolution adopted by the Economic and Social Council on 16 February 1946, no international assistance should be given to traitors, quislings and war criminals, and nothing should be done to prevent in any way their surrender and punishment.

(d) It should be the concern of the Organization to ensure that its assistance is not exploited in order to

encourage subversive or hostile activities directed against the Government of any of the United Nations.

(e) It should be the concern of the Organization to ensure that its assistance is not exploited by persons in the case of whom it is clear that they are unwilling to return to their countries of origin because they prefer idleness to facing the hardships of helping in the reconstruction of their countries, or by persons who intend to settle in other countries for purely economic reasons, thus qualifying as emigrants.

(f) On the other hand it should equally be the concern of the Organization to ensure that no *bona fide* and deserving refugee or displaced person is deprived of such assistance as it may be in a position to offer.

(g) The Organization should endeavor to carry out its functions in such a way as to avoid disturbing friendly relations between nations. In the pursuit of this objective, the Organization should exercise special care in cases in which the re-establishment or re-settlement of refugees or displaced persons might be contemplated, either in countries contiguous to their respective countries of origin or in non-self-governing countries. The Organization should give due weight, among other factors, to any evidence of genuine apprehension and concern felt in regard to such plans, in the former case, by the country of origin of the persons involved, or, in the latter case, by the indigenous population of the non-self-governing country in question.

2. To ensure the impartial and equitable application of the above principles and of the terms of the definition which follows, some special system of semi-judicial machinery should be created, with appropriate constitution, procedure and terms of reference.

PART I

Refugees and displaced persons within the meaning of the resolution adopted by the Economic and Social Council of the United Nations on 16 February 1946.

Section A *Definition of Refugees.*

1. Subject to the provisions of sections C and D and of Part II of this Annex, the term "refugee" applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:

(a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;

(b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;

(c) persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.

2. Subject to the provisions of sections C and D and of Part II of this Annex regarding the exclusion of certain categories of persons, including war criminals, quislings and traitors, from the benefits of the Organization, the term "refugee" also applies to a person, other than a displaced person as defined in section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of

the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.

3. Subject to the provisions of Section D and of Part II of this Annex, the term "refugee" also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.

4. The term "refugee" also applies to unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin. Such children, 16 years of age or under, shall be given all possible priority assistance, including, normally, assistance in repatriation in the case of those whose nationality can be determined.

Section B *Definition of Displaced Persons.* The term "displaced person" applies to a person who, as a result of the actions of the authorities of the regimes mentioned in Part I, section A, paragraph 1(a) of this Annex has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons. Displaced persons will only fall within the mandate of the Organization subject to the provisions of sections C and D of Part I and to the provisions of Part II of this Annex. If the reasons for their displacement have ceased to exist, they should be repatriated as soon as possible in accordance with article 2, paragraph 1(a) of this Constitution, and subject to the provision of paragraph (c), subparagraphs (ii) and (iii) of the

General Assembly resolution of 12 February 1946 regarding the problem of refugees (Annex III).

Section C *Conditions under which "Refugees" and "Displaced Persons" will become the concern of the Organization.*

1. In the case of all the above categories except those mentioned in section A, paragraphs 1(b) and 3 of this Annex, persons will become the concern of the Organization in the sense of the resolution adopted by the Economic and Social Council on 16 February 1946 if they can be repatriated, and the help of the Organization is required in order to provide for their repatriation, or if they have definitely, in complete freedom and after receiving full knowledge of the facts, including adequate information from the Governments of their countries of nationality or former habitual residence, expressed valid objections to returning to those countries.

(a) The following shall be considered as valid objections:

(i) persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations;

(ii) objections of a political nature judged by the Organization to be "valid", as contemplated in

paragraph 8(a)¹ of the report of the Third Committee of the General Assembly as adopted by the Assembly on 12 February 1946:

(iii) in the case of persons falling within the category mentioned in section A, paragraphs 1(a) and 1(c) compelling family reasons arising out of previous persecution, or, compelling reasons of infirmity or illness.

(b) The following shall normally be considered "adequate information": information regarding conditions in the countries of nationality of the refugees and displaced persons concerned, communicated to them directly by representatives of the Governments of these countries, who shall be given every facility for visiting camps and assembly centres of refugees and displaced persons in order to place such information before them.

2. In the case of all refugees falling within the terms of Section A paragraph 1(b) of this Annex, persons will become the concern of the Organization in the sense of the resolution adopted by the Economic and Social Council of the United Nations on 16 February 1946, so long as the Falangist regime in Spain continues. Should that regime be replaced by a democratic regime they will have to produce valid objections against returning to Spain corresponding to those indicated in paragraph 1(a) of this section.

¹ Paragraph 8 (a):

"In answering the representative of Belgium, the Chairman stated that it was implied that the International body would judge what were, or what were not, 'valid objections'; and that such objections clearly might be of a political nature."

Section D *Circumstances in which Refugees and Displaced Persons will cease to be the concern of the Organization.* Refugees or displaced persons will cease to be the concern of the Organization:

(a) when they have returned to the countries of their nationality in United Nations territory, unless their former habitual residence to which they wish to return is outside their country of nationality; or

(b) when they have acquired a new nationality; or

(c) when they have, in the determination of the Organization become otherwise firmly established; or

(d) when they have unreasonably refused to accept the proposals of the Organization for their resettlement or repatriation; or

(e) when they are making no substantial effort towards earning their living when it is possible for them to do so, or when they are exploiting the assistance of the Organization.

PART II

Persons who will not be the concern of the Organization.

1. War criminals, quislings and traitors.
2. Any other person who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.¹

3. Ordinary criminals who are extraditable by treaty.

4. Persons of German ethnic origin, whether German nationals or members of German minorities in other countries, who:

(a) have been or may be transferred to Germany from other countries;

(b) have been, during the second world war, evacuated from Germany to other countries;

(c) have fled from, or into, Germany, or from their places of residence into countries other than Germany in order to avoid falling into the hands of Allied armies.

5. Persons who are in receipt of financial support and protection from their country of nationality, unless their country of nationality requests international assistance for them.

6. Persons who, since the end of hostilities in the second world war:

(a) have participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by

¹ Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them.

armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization.

(b) have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin;

(c) at the time of application for assistance, are in the military or civil service of a foreign State.

ANNEX II

BUDGET AND CONTRIBUTIONS FOR THE FIRST FINANCIAL YEAR

1. The provisional budget for the first financial year shall be the sum of 4,800,000 United States dollars for administrative expenses, and a sum of 151,060,500 United States dollars for operational expenses (except for large-scale re-settlement expenses), and a sum of 5,000,000 United States dollars for large-scale re-settlement expenses. Any unspent balance under these headings shall be carried over to the corresponding heading as a credit in the budget of the next financial year.

2. These sums (except for large-scale re-settlement expenses), shall be contributed by the members in the following proportions:

A—FOR ADMINISTRATIVE EXPENSES

<u>Country</u>	<u>Percentage</u>	<u>Country</u>	<u>Percentage</u>
Afghanistan	0.05	Liberia	0.04
Argentina	1.85	Luxembourg	0.05
Australia	1.97	Mexico	0.63
Belgium	1.35	Netherlands	1.40
Bolivia	0.08	New Zealand	0.50
Brazil	1.85	Nicaragua	0.04
Byelorussian		Norway	0.50
Soviet Socialist		Panama	0.05
Republic	0.22	Paraguay	0.04
Canada	3.20	Peru	0.20
Chile	0.45	Philippine	
China	6.00	Republic	0.29
Colombia	0.37	Poland	0.95
Costa Rica	0.04	Saudi Arabia	0.08
Cuba	0.29	Sweden	2.35
Czechoslovakia	0.90	Syria	0.12
Denmark	0.79	Turkey	0.91
Dominican		Ukrainian Soviet	
Republic	0.05	Socialist	
Ecuador	0.05	Republic	0.84
Egypt	0.79	Union of South	
El Salvador	0.05	Africa	1.12
Ethiopia	0.08	Union of Soviet	
France	6.00	Socialist	
Greece	0.17	Republics	6.34
Guatemala	0.05	United Kingdom	11.48
Haiti	0.04	United States of	
Honduras	0.04	America	39.89
Iceland	0.04	Uruguay	0.18
India	3.95	Venezuela	0.27
Iran	0.45	Yugoslavia	0.33
Iraq	0.17		
Lebanon	0.06		100.00

B—FOR OPERATIONAL EXPENSES
(Except for Large Scale Resettlement)

<u>Country</u>	<u>Percentage</u>	<u>Country</u>	<u>Percentage</u>
Afghanistan . . .	0.03	Liberia	0.02
Argentina	1.50	Luxembourg . . .	0.04
Australia	1.76	Mexico	0.54
Belgium	1.00	Netherlands . . .	0.90
Bolivia	0.07	New Zealand . . .	0.44
Brazil	1.50	Nicaragua	0.02
Byelorussian		Norway	0.44
Soviet Socialist		Panama	0.04
Republic	0.16	Paraguay	0.02
Canada	3.50	Peru	0.17
Chile	0.39	Philippines	0.24
China	2.50	Poland	0.61
Colombia	0.32	Saudi Arabia . . .	0.07
Costa Rica	0.02	Sweden	2.20
Cuba	0.24	Syria	0.10
Czechoslovakia . .	0.80	Turkey	0.88
Denmark	0.68	Ukrainian Soviet	
Dominican		Socialist	
Republic	0.04	Republic	0.62
Ecuador	0.04	Union of South	
Egypt	0.68	Africa	1.00
El Salvador	0.03	Union of Soviet	
Ethiopia	0.07	Socialist	
France	4.10	Republics	4.69
Greece	0.15	United Kingdom . .	14.75
Guatemala	0.04	United States of	
Haiti	0.02	America	45.75
Honduras	0.02	Uruguay	0.15
Iceland	0.02	Venezuela	0.23
India	3.66	Yugoslavia	0.23
Iran	0.39	New Members . . .	1.92
Iraq	0.15		
Lebanon	0.05		100.00

3. Contributions to large-scale re-settlement expenses shall be governed by the provisions of article 10, paragraph 4 of this Constitution.

ANNEX III**RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY ON
12 FEBRUARY 1946****(DOCUMENT A/45)****The General Assembly,**

RECOGNIZING that the problem of refugees and displaced persons of all categories is one of immediate urgency and recognizing the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and the war criminals, quislings and traitors referred to in paragraph (d) below, on the other:

(a) **DECIDES** to refer this problem to the Economic and Social Council for thorough examination in all its aspects under item 10 of the agenda for the first session of the Council and for report to the second part of the first session of the General Assembly;

(b) **RECOMMENDS** to the Economic and Social Council that it establish a special committee for the purpose of carrying out promptly the examination and preparation of the report referred to in paragraph (a); and

(c) **RECOMMENDS** to the Economic and Social Council that it take into consideration in this matter the following principles:

(i) this problem is international in scope and nature;

(ii) no refugees or displaced persons who have finally and definitely, in complete freedom and after receiving full knowledge of the facts, including adequate information from the Governments of their countries of origin, expressed valid

objections to returning to their countries of origin and who do not come within the provisions of paragraph (d) below, shall be compelled to return to their country of origin. The future of such refugees or displaced persons shall become the concern of whatever international body may be recognized or established as a result of the report referred to in paragraphs (a) and (b) above, except in cases where the Government of the country where they are established has made an arrangement with this body to assume the complete cost of their maintenance and the responsibility for their protection;

(iii) the main task concerning displaced persons is to encourage and assist in every way possible their early return to their countries of origin. Such assistance may take the form of promoting the conclusion of bilateral arrangements for mutual assistance in the repatriation of such persons, having regard to the principles laid down in paragraph (c) (ii) above;

(d) CONSIDERS that no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors, in conformity with present or future international arrangements or agreements;

(e) CONSIDERS that Germans being transferred to Germany from other States or who fled to other States from Allied troops, do not fall under the action of this declaration in so far as their situation may be decided by Allied forces of occupation in Germany, in agreement with the Governments of the respective countries.

DEPARTMENT OF STATE**The Legal Adviser**

February 24, 1947.

MEMORANDUM

Following is a complete list of the Governments for which, according to information received by the Department of State, the Constitution of the International Refugee Organization has been signed:

Canada	December 16, 1946
Dominican Republic	December 17, 1946
France	December 17, 1946
Guatemala	December 16, 1946
Honduras	December 18, 1946
Liberia	December 31, 1946
Netherlands	January 28, 1947
Norway	February 4, 1947
Philippine Republic	December 18, 1946
United Kingdom	February 5, 1947
United States	December 16, 1946

APPENDIX II

PRESIDENTIAL DIRECTIVE OF DECEMBER 22, 1945

COPY

December 22, 1945.

Memorandum to—

Secretary of State

Secretary of War

Attorney General

War Shipping Administrator

Surgeon General of the Public Health Service

Director General of UNRRA

The grave dislocation of populations in Europe resulting from the war has produced human suffering that the people of the United States cannot and will not ignore. This Government should take every possible measure to facilitate full immigration to the United States under existing quota laws.

The war has most seriously disrupted our normal facilities for handling immigration matters in many parts of the world. At the same time, the demands upon those facilities have increased manifold. It is therefore necessary that immigration under the quotas be resumed initially in the areas of greatest need. I, therefore, direct the Secretary of State, the Secretary of War, the Attorney General, the Surgeon General of the Public Health Service, the War Shipping Administrator, and other appropriate officials to take the following action:

The Secretary of State is directed to establish with the utmost dispatch consular facilities at or near displaced person and refugee assembly center areas in the American zones of occupation. It shall be the responsibility of these

consular officers, in conjunction with the immigrant inspectors, to determine as quickly as possible the eligibility of the applicants for visas and admission to the United States. For this purpose the Secretary will, if necessary, divert the personnel and funds of his Department from other functions in order to insure the most expeditious handling of this operation. In cooperation with the Attorney General, he shall appoint as temporary vice consuls, authorized to issue visas, such officers of the Immigration and Naturalization Service as can be made available for this program. Within the limits of administrative discretion, the officers of the Department of State assigned to this program shall make every effort to simplify and to hasten the process of issuing visas. If necessary, blocs of visa numbers may be assigned to each of the emergency consular establishments. Each such bloc may be used to meet the applications filed at the consular establishment to which the bloc is assigned. It is not intended, however, entirely to exclude the issuance of visas in other parts of the world.

Visas should be distributed fairly among persons of all faiths, creeds, and nationalities. I desire that special attention be devoted to orphaned children, to whom it is hoped the majority of visas will be issued.

With respect to the requirement of law that visas may not be issued to applicants likely to become public charges after admission to the United States, the Secretary of State shall cooperate with the Immigration and Naturalization Service in perfecting appropriate arrangements with welfare organizations in the United States which may be prepared to guarantee financial support to successful applicants. This may be accomplished by corporate affidavit or by any means deemed appropriate and practicable.

The Secretary of War, subject to limitations imposed by the Congress on War Department appropriations, will give such help as is practicable in—

(a) Furnishing information to appropriate consular officers and immigrant inspectors to facilitate the selection of applicants for visas; and

(b) Assisting until other facilities suffice in—

(1) Transporting immigrants to a European port;

(2) Feeding, housing, and providing medical care to such immigrants until embarked; and

(c) Making available office facilities, billets, messes, and transportation for Department of State, Department of Justice, and United Nations Relief and Rehabilitation Administration personnel connected with this work, where practicable and requiring no out-of-pocket expenditure by the War Department and when other suitable facilities are not available.

The Attorney General, through the Immigration and Naturalization Service, will assign personnel to duty in the American zones of occupation to make the immigration inspection, to assist consular officers of the Department of State in connection with the issuance of visas, and to take the necessary steps to settle the cases of those aliens presently interned at Oswego through appropriate statutory and administrative processes.

The Administrator of the War Shipping Administration will make the necessary arrangements for water transportation from the port of embarkation in Europe to the United States subject to the provision that the movement of immigrants will in no way interfere with the scheduled

return of service personnel and their spouses and children from the European theater.

The Surgeon General of the Public Health Service will assign to duty in the American zones of occupation the necessary personnel to conduct the mental and physical examinations of prospective immigrants prescribed in the immigration laws.

The Director General of the United Nations Relief and Rehabilitation Administration will be requested to provide all possible aid to the United States authorities in preparing these people for transportation to the United States and to assist in their care, particularly in the cases of children in transit and others needing special attention.

In order to insure the effective execution of this program, the Secretary of State, the Secretary of War, the Attorney General, War Shipping Administrator, and the Surgeon General of the Public Health Service shall appoint representatives to serve as members of an interdepartmental committee under the chairmanship of the Commissioner of Immigration and Naturalization.

HARRY S. TRUMAN

APPENDIX III

OCCUPATIONAL OUTLOOK

In the below résumé there is shown opposite each general occupational category the percentage and numbers of displaced persons according to an over-all survey who possess the general occupational skills of that category. The occupational outlook in the United States is then given, together with pertinent comments.

CONSTRUCTION AND MAINTENANCE

(6:7 percent or 24,559 employable persons)

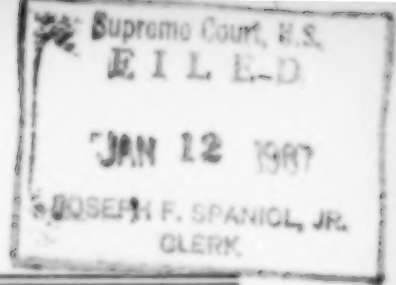
The construction industry is now operating at a high level throughout the country on both residential construction and industrial commercial construction. A seasonable drop until spring is expected during the next few months. Stringencies of construction workers are reported in a number of areas in the country, with a general need for all types of workers. The construction industry is highly unionized.

Bricklayers. Anticipated expansion in new construction and repairs makes the outlook very good for the next 5 years; moderate thereafter.

Federal Housing Administration, in its Monthly Digest of Current Housing Situation as of October 1, 1947, shows bricklayers in short supply in the following areas:

Connecticut: Hartford	New York:
District of Columbia: Washington	Albany
Maine: Bangor	Buffalo
Maryland: Baltimore	New York
Massachusetts: Boston	Pennsylvania: Pittsburgh
New Hampshire: Manchester	Rhode Island: Providence
New Jersey:	Vermont: Burlington
Camden	Alabama: Birmingham
Newark	Arkansas: Little Rock

(5)
No. 86-228



In The
Supreme Court of the United States
October Term, 1986

— o —
JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

— o —
**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

— o —
JOINT APPENDIX
— o —

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**PETITION FOR CERTIORARI FILED AUGUST 9, 1986
CERTIORARI GRANTED NOVEMBER 10, 1986**

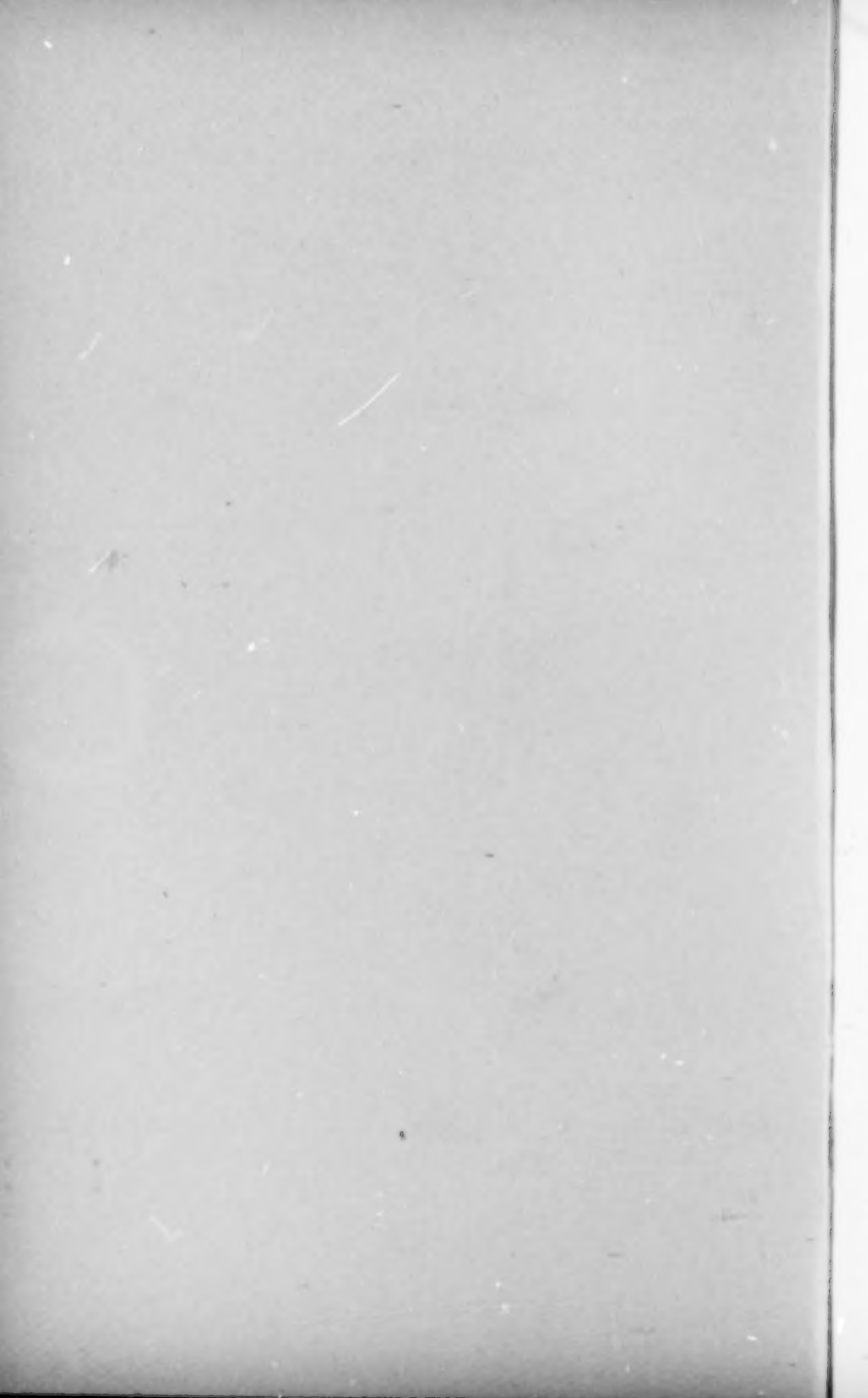


TABLE OF PARTS OF THE RECORD CONTAINED
IN THE JOINT APPENDIX

	Page
1. Relevant Docket Entries in the Courts Below	1
2. The Amended Complaint and Affidavit of Good Cause, dated July 17, 1982	20
3. Trial Exhibits	
<i>Exhibit No.</i>	
A1 Provisional Identity Card, dated April 26, A1 T 1944 (Lithuanian with English translation A1 T)	28
A2 Certificate from the Ex-Political Prison- ers Committee, dated June 18, 1946	29
A3 Application for Immigration Visa, dated January 9, 1947	30
A4 Alien Registration Foreign Service Form. dated January 9, 1947	34
A5 T Certificate of Good Conduct, dated Janu- ary 14, 1947 (English translation)	37
A6 Excerpt from the Act No. 87 of the Na- tional Delegate of the Vatican for the Lithuanians in Germany and Austria, dated January 18, 1947	38
A7 Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention (Form N-300), dated May 29, 1948	38
A10 Application to File Petition for Natural- ization (Form N-400), dated October 23, 1953	42
A11 Petition for Naturalization (Form N- 405), dated October 23, 1953	48

<i>Exhibit</i>		<i>Page</i>
B17 T	Lithuanian Bank Resignation Request, dated October 10, 1941 Translation _____	51
A18 T	Telsiai Seminary Booklet, dated Nov. 20, 1941 _____	51
J13	Registration Record, 16 November 1944____	52
J13 T	Mayor's Office, Poltringen, Germany, and Trans. Excerpt _____	55
13-DT	Letter, to Mrs. S. Kungys, dated Dec. 18, 1944, Trans. _____	57
J1	Report, 13 February 1945, District _____	58
J1 T	Counselor, Foreign Nationals Registra- tion Office, Tuebingen, Germany _____	59
J3 T	Report, 1 October 1945, Mayor of the Mu- nicipality of Poltringen, Trans. Excerpt____	60
N5 T	Lithuanian Matriculation Certificate, Trans. dated Nov. 10, 1945 _____	61
N9 T	Application to Tuebingen University dated Nov. 16, 1945 _____	63
J5 T	Report, 2 February 1946, Mayor of Pol- tringen, Trans. Excerpt _____	65
J8 T	Report, 2 March 1946 Mayor of Poltrin- gen _____	66
J7 T	Report, 23 March 1946 Mayor of Poltrin- gen _____	67
J9 T	Report, 22 May 1946, Mayor to Dist. Counselor in Tuebingen, Trans. Excerpt____	68
53-D	War Department memo, 3/4/47. re: screening committee _____	69
A14	J. Kungys, INS Statement of December 3, 1975 _____	70

<i>Exhibit</i>	<i>Page</i>
A15 A J. Kungys, Excerpts of OSI Interview of Mar. 27, 1981	79
K1 T Letter Kungys to Vasilius, dated Sept. 12, 1981, Trans.	138
K2 T Letter, Kungys to Vasilius, dated October 5, 1981, Trans.	138
S3 A Deposition Excerpts of Julius Goldberg, July 21, 1982	140
58-D Frank Schilling Transcript, May 10, 1983	174
4. S. Finger, Excerpts of Trial Testimony	181
5. Judgment of District Court filed October 11, 1983	234
6. Order of Third Circuit Staying Mandate filed July 23, 1986	235

The following opinions, judgments, statutes, regulations, executive directives, circulars and exhibits have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

	Page
Appendix A—Opinion of the United States Court of Appeals For the Third Circuit, dated June 20, 1986	1a
Appendix B—Judgment of the United States Court of Appeals For the Third Circuit, dated June 20, 1986	38a
Appendix C—Opinion of United States District Court For the District of New Jersey, dated September 28, 1983, Constituting Findings of Fact and Conclusions of Law	39a
Appendix D—Statute Involved [8 U.S.C. § 1451(a)]	138a
Appendix E—Federal Register, December 24, 1946 (Exh. 34-D). [22 C.F.R. 61.313.(3)(i)(c)]	140a
Appendix F—Statement and Directive of President Truman, December 22, 1945 (Exh. 35-D)	143a
Appendix G—Department of State Circular, July 8, 1947 (Exh. 54-D For ID.)	152a
Appendix H—Tuebingen Residence Permit and Trans-lation (Exh. C1 and C1 T)	156a

The following reports, INS Monthly Reviews, State Department Bulletins, federal regulations, UNRRA order and IRO Constitution have been omitted in printing this joint appendix because they appear on the following pages in the Brief and Appendix Amicus Curiae in support of the Petition for a Writ of Certiorari, but were not part of the record below:

APPENDIX	DESCRIPTION	PAGE
Appendix A—	Report of the Repatriation Poll of Displaced Persons in UNRRA Assembly Centers in Germany for the Period 1-14 May, 1946: Analysis of Negative votes, Attachment 8, P.A.G.-4/3.0.11.0.1.4:2	1a
Appendix B—	President Truman's Plan for Refugees, Department of State Immigration and Naturalization Service Monthly Review (hereinafter INS Monthly Review), Vol. III, No. 7 (Jan. 1946, pp. 254-255)	25a
Appendix C—	Displaced Persons, by INS Commissioner Ugo Carusi, INS Monthly Review, Vol. IV, No. 5, (Nov. 1946, pp. 54-56)	30a
Appendix D—	Displaced Persons in the United States, INS Monthly Review, Vol. V, No. 7 (Jan. 1948, @ pp. 103-105)	36a
Appendix E—	DEPT STATE BULL., Vol. XV, No. 386, Nov. 24, 1946, pp. 934-938	44a
Appendix F—	The Future of Displaced Persons in Europe, Statement of Lt. Col. Jerry M. Sage, DEP'T STATE BULL., Vol. XVII, No. 419, July 13, 1947, pp. 86-88	51a
Appendix G—	22 C.F.R. 61.313(i)(c) Supp. 1946	58a

	Page
Appendix H—DEPT STATE BULL. Vol. XVI, No. 401, March 9, 1947, pp. 423-429	60a
Appendix I—UNRRA Order No. 52, Eligibility For UN Assistance. June 24, 1946. U.N.P.A.G.-4/4.2-82	75a
Appendix J—Constitution of the International Refu- gee Organization	83a

RELEVANT DOCKET ENTRIES
IN THE COURTS BELOW

A) United States vs. Juozas Kungys, United States District Court For the District of New Jersey (81-2305)

DATE NR. PROCEEDINGS

7-22-81	1	Complaint filed.
10- 5-81	16	Answer filed.
6- 4-82	62	Notice of motion of defendant for trial by Jury, returnable 6-28-82, brief and affidavit of service, filed 6-3-82. .
7- 1-82	73	Pre-trial Order, filed 6-30-82 (Perretti) (Scheduling trial for 8-2-82) Notice Mailed.
7-14-82	81	Hearing on motion of defendant for trial by jury. Ordered motion denied.
7-19-82	83	Amended Complaint and proof of mailing, filed 7-16-82.
2- 1-83	112	Order denying plaintiff's motion for leave to amend the complaint and denying defendant's motion to dismiss the amended complaint, filed 1-31-83 (Meanor). Notice Mailed.
4- 7-83	116	Trial without a Jury moved before the Hon. Dickenson R. Debevoise (4-5-83) Ordered trial adjourned to 4-6-83.
4- 7-83		Trial Continued. (4-6-83) Ordered trial adjourned to 4-8-83.
4-12-83		Trial without a jury continued. (4-8-83) Ordered trial adjourned to 4-15-83.
4-19-83		Trial without a jury continued. (4-15-83) Ordered trial adjourned to 4-19-83.
4-20-83		Trial without a jury continued. (4-19-83) Ordered trial adjourned until 4-20-83.

DATE NR. PROCEEDINGS

- 4-22-83 Trial without a jury continued. (4-20-83)
Ordered trial adjourned until 4-21-83.
- 4-25-83 Trial without a jury continued. (4-21-83)
Ordered trial adjourned to 4-22-83.
- 4-25-83 Trial without a jury continued. (4-22-83)
Ordered trial adjourned to 5-16-83.
- 5-19-83 Trial without a jury continued. (5-16-83)
Ordered trial adjourned to 5-17-83.
- 5-19-83 Trial without a jury continued. (5-17-83)
Hearing on motion of defendant for dismissal of complaint. Ordered motion denied.
Ordered trial adjourned to 5-18-83.
- 5-19-83 Trial without a jury continued. (5-18-83)
Ordered trial adjourned to 5-20-83.
- 5-24-83 Trial without a jury continued. (5-20-83)
Ordered trial adjourned to 6-14-83.
- 6-17-83 Trial without jury continued. (6-14-83)
Counsel for both parties moved further exhibits into evidence. DECISION RESERVED.
- 9-15-83 117 Transcript of trial in 13 volumes, filed.
- 9-30-83 118 Opinion filed 9-28-83. (Debevoise) (Judgment for defendant Juozas Kungys) (Copy to NJLJ)
- 10-12-83 119 Order dismissing action on the merits with costs in favor of defendant Juozas Kungys and against plaintiff USA filed 10-11-73. (Debevoise) Notice mailed.

DATE NR. PROCEEDINGS

12- 8-83 123 Notice of appeal of plaintiff filed 12-7-83 at 12:30 PM. USCA 83-5884. Copies of notice of appeal sent to U.S.C.A. and Donald J. Williamson.

B) United States Court of Appeals for the Third Circuit (83-5884).

1-7-86 Argued Before Circuit Judges Mansmann, Adams and Sloviter.

6-20-86 Opinion for the United States Court of Appeals filed by Circuit Judge Mansmann.

6-20-86 Judgment by the United States Court of Appeals that the Judgment of the United States District Court Appealed from is Vacated and the Case is Remanded for Denaturalization Proceedings.

7-23-86 Order of Court of Appeals Staying Mandate.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-2305

UNITED STATES OF AMERICA,
PLAINTIFF,
v.

JUOZAS KUNGYS,
DEFENDANT.

Hon. H. Curtis Meanor

Amended Complaint

Plaintiff, UNITED STATES OF AMERICA, by and through its attorneys, complains of defendant as follows:

I. JURISDICTION AND VENUE

1. This is an action pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended. 8 U.S.C. § 1451(a), to revoke the United States citizenship of Juozas Kungys (hereinafter "defendant"), to set aside the February 3, 1954 judgment of this Court admitting defendant to citizenship, and to cancel defendant's Certificate of Naturalization No. 7131022.

2. Plaintiff is the United States of America.

3. Defendant is a natural person whose residence is 778 Grove Street, Clifton, New Jersey, within the jurisdiction and venue of this Court.

4. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1345 (except as otherwise provided by Act of Congress, the District Courts shall have original jurisdiction

of all civil actions commenced by the United States), 8 U.S.C. § 1421(a) (jurisdiction to naturalize citizens is conferred on the United States District Courts), and 8 U.S.C. § 1451(a) (action to revoke citizenship is to be brought in any court specified in 8 U.S.C. § 1421(a)).

5. Attached as Exhibit A is the affidavit of Charles L. Gittens, Deputy Director (Operations), Office of Special Investigations, Criminal Division, United States Department of Justice, showing good cause for this action, as required by the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

II. FACTS

A. Defendant's Activities During World War II

6. Defendant was born at Reistru, Silales, Lithuania on September 21, 1915.

7. Defendant resided in Kedainiai, Lithuania during all or part of 1939, 1940 and 1941.

8. In June, 1941 Lithuania was invaded and occupied by the armed forces of Nazi Germany.

9. In or about July, 1941 defendant, in association with the armed forces of Nazi Germany, participated in the killing of approximately one hundred unarmed civilians in or near the village of Babences (Babenus), Lithuania.

10. In or about July or August, 1941 defendant, in association with the armed forces of Nazi Germany, led an armed group of men which forced approximately three thousand Jewish civilians from their homes in Kedainiai, Lithuania into a ghetto. During said forced ghettoization

the armed group confiscated the property of the Jewish civilian population.

11. In or about August or September, 1941 defendant, in association with the armed forces of Nazi Germany, organized, led and participated in the killing of approximately two thousand unarmed civilian Jewish men, women and children near Kedainiai, Lithuania, by, *inter alia*:

- a. exhorting the men of Kedainiai to participate in said execution;
 - b. distributing firearms and ammunition to said execution squad;
 - c. collecting and transporting the victims to be killed to the execution site;
 - d. forcing the victims into a mass grave, and then shooting them.
- B. Defendant's Unlawful Efforts To Obtain United States Citizenship

12. On or about January 9, 1947 at Stuttgart, Germany defendant executed under oath an "Application for Immigration Visa (Quota) "No. 1530 (Foreign Service Form No. 255) and an "Alien Registration Foreign Service Form" No. 6887153 (Form AR-102).

13. Defendant misrepresented and concealed material facts in the said Application for Immigration Visa and in the said Alien Registration Foreign Service Form, as follows:

- a. Defendant swore that he was born on October 4, 1913, and thereby concealed the true date of September 21, 1915.

b. Defendant swore that he was born in Kaunas, Lithuania, and thereby concealed his true place of birth, Reistru, Lithuania.

c. Defendant swore that he resided at Telsiai, Lithuania during the period 1940-1942, and thereby concealed his true place of residence in Kedainiai, Lithuania from December 1939 - October 1941.

d. Defendant swore that he was not a criminal when in fact he had participated in the persecution and murder of unarmed civilians as described above in paragraphs 9, 10 and 11.

e. Defendant swore that during the five-year period preceding January 1947, he had been occupied as a student, dental technician and farm and forestry worker, and thereby concealed his true occupation and activities during the period 1942-1944.

f. Defendant swore that he was married to Sofia Kungys nee Anuskeviciute when in fact he was not.

14. Based on the misrepresentations and concealments enumerated above in paragraph 13, on March 4, 1948 the United States Consulate at Stuttgart issued to defendant Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended.

15. Defendant entered the United States at New York, New York on April 29, 1948 on the aforementioned visa.

16. On or about May 29, 1948 defendant executed under oath an "Application for a Certificate of Arrival and

Preliminary Form for a Declaration of Intention" No. 119188 (Form N-300).

17. Defendant misrepresented and concealed facts in said Form N-300, as follows:

a. Defendant swore that his date of birth was October 4, 1913, thereby concealed his true date of birth, September 21, 1915.

b. Defendant swore that he was born in Kaunas, Lithuania, and thereby concealed his true place of birth, Reistrn, Lithuania.

c. Defendant swore he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas Lithuania when in fact he was not.

18. On or about May 11, 1953 defendant executed an "Application to File Petition for Naturalization" No. 92961 and an attached "Statement of Facts for Preparation of Petition," (together comprising Form N-400). Form N-400 stated in its instructions to applicants:

IMPORTANT.—Under the naturalization laws, citizenship may be revoked for concealment of a material fact or for willful misrepresentation in connection with the naturalization proceedings.

19. Despite the above admonition, defendant willfully misrepresented and concealed material facts in the Form N-400, as follows:

a. Defendant swore that he had not given false testimony to obtain benefits under the immigration and naturalization laws when in fact he had given false testimony to the United States Consul at Stuttgart, Germany

in order to obtain a visa and to the Immigration and Naturalization Service (hereinafter "INS") in order to obtain benefits, as described above in paragraphs 13 and 17.

b. Defendant swore that he had never committed a crime involving moral turpitude when in fact he had participated in the persecution and murder of unarmed civilians as described above in paragraphs 9, 10 and 11.

c. Defendant swore that his date of birth was October 4, 1913, and thereby concealed his true date of birth. September 21, 1915.

d. Defendant swore that he was born in Kaunas, Lithuania, and thereby concealed his true place of birth, Reistru, Lithuania.

e. Defendant swore that he was married on August 24, 1943 to Sofia Kungys nee Anuskeviciute in Kaunas, Lithuania when in fact he was not.

20. On October 23, 1953 defendant swore to the truth of the statements contained in the Form N-400.

21. On October 23, 1953 defendant executed under oath a "Petition for Naturalization" No. 92961 (Form N-405).

22. Defendant willfully misrepresented and concealed material facts in the Form N-405, as follows:

a. Defendant swore that his date of birth was October 4, 1913 and thereby concealed his true date of birth of September 21, 1915.

b. Defendant swore that he was born in Kaunas, Lithuania and thereby concealed his true place of birth, Reistru, Lithuania.

c. Defendant swore that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania when in fact he was not.

23. On February 3, 1954 this Court granted defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 7131022.

24. Defendant has remained a citizen of the United States of America since February 3, 1954.

25. Under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), defendant's citizenship must be revoked and his Certificate of Naturalization must be cancelled if his citizenship was *either*:

a. Illegally procured, *or*

b. Procured by concealment of a material fact or by willful misrepresentation.

COUNT I

Illegal Procurement of Citizenship: Unlawful Entry (Persecution)

26. Plaintiff realleges and incorporates by reference paragraphs 1 through 25 of this Complaint.

27. The requirements for legally procuring naturalized citizenship are set forth in Section 316 of the Immigration and Nationality Act, 8 U.S.C. § 1427. Section 316 (a)(1) provides, *inter alia*, that:

(a) *Residence*. No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully* admitted for permanent residence,

within the United States for at least five years * * *. (emphasis added).

28. As set forth in paragraphs 12 through 15, defendant entered the United States under the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended. Under Section 23 of that Act, defendant had the burden of proving that he was not subject to exclusion under any provision of the immigration laws.

29. Section 25 of the Immigration Act of 1924, provided *inter alia*, that:

The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as part of such laws * * *. An alien * * * shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act * * *.

30. Presidential Proclamation No. 2523 of November 14, 1941, (55 Stat. 1696), which was in effect at the time of defendant's entry into the United States, provided, *inter alia*, that:

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

31. Pursuant to the above Presidential Proclamation, the Secretary of State and the Attorney General promulgated regulations making inadmissible into the United States persons who had been guilty of, or who had advocated or acquiesced in, activities or conduct contrary to

civilization and human decency on behalf of Axis countries during World War II. Act of May 22, 1918 (40 Stat. 559), as amended by the Act of June 21, 1941 (55 Stat. 252) and Presidential Proclamation No. 2523 of November 14, 1941 (55 Stat. 1696), 10 Fed. Reg. 8995, 8997, 9000 (1945); 8 C.F.R. §§ 175.52(a), 175.53(j)(1947S); 22 C.F.R. § 58 (1947S).

32. Defendant's participation in the persecution and murder of unarmed civilians, as described in paragraphs 9 through 11 above, rendered him inadmissible to the United States as one who had been guilty of, or who had advocated or acquiesced in, activities or conduct contrary to civilization and human decency on behalf of Axis countries during World War II.

33. Because defendant was inadmissible to the United States, his entry in the United States was unlawful.

34. Because defendant had not gained lawful admittance into the United States, his subsequent naturalization was unlawful under Section 316(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(1).

35. Because defendant's citizenship was thus illegally procured, it must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

WHEREFORE, plaintiff demands:

1. A declaration that defendant illegally procured his citizenship and Certificate of Naturalization.

2. Judgment revoking and setting aside the February 3, 1954 Order of this Court admitting defendant to United States citizenship, and cancelling defendant's Certificate of Naturalization No. 7131022.

3. Judgment forever restraining and enjoining defendant from claiming any rights, privileges or advantages under any document evidencing United States citizenship.

4. Judgment requiring defendant immediately to surrender and deliver his Certificate of Naturalization No. 7131022 to the Attorney General.

5. Judgment giving plaintiff such other relief as may be lawful and proper.

COUNT II

Illegal Procurement of Citizenship: Unlawful Entry (False Testimony)

36. Plaintiff realleges and incorporates by reference paragraphs 1 through 25 and 27 of this Complaint.

37. As set forth in paragraphs 12 through 15, defendant entered the United States under the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended, Section 7(b) of that Act required that in the application for an immigration visa:

* * * the immigrant shall state (1) the immigrant's full and true name; age * * * the date and place of birth * * * whether married or single * * * and (3) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws, as may be by regulations prescribed.

38. Section 2(f) of the 1924 Immigration Act provided, *inter alia*, that:

No immigration visa shall be issued to an immigrant if * * * the application fails to comply with the provisions of this Act * * *.

39. Because defendant failed to provide his true date and place of birth, true places of residence, true wartime

occupation and activities and true information concerning marital status in his Application for Immigrant Visa and Alien Registration Form, as described above in paragraph 13, his visa was procured unlawfully and his entry into the United States was unlawful.

40. Because defendant had not gained lawful admittance into the United States, his subsequent naturalization was unlawful under Section 316(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(1).

41. Because defendant's citizenship was thus illegally procured, it must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

WHEREFORE, plaintiff demands:

1. A declaration that defendant illegally procured his citizenship and Certificate of Naturalization.

2. Judgment revoking and setting aside the February 3, 1954 Order of this Court admitting defendant to United States citizenship, and cancelling defendant's Certificate of Naturalization No. 7131022.

3. Judgment forever restraining and enjoining defendant from claiming any rights, privileges or advantages under any document evidencing United States citizenship.

4. Judgment requiring defendant immediately to surrender and deliver his Certificate of Naturalization No. 7131022 to the Attorney General.

5. Judgment giving plaintiff such other relief as may be lawful and proper.

COUNT III

*Illegal Procurement of Citizenship: Lack of
Good Moral Character (Persecution)*

42. Plaintiff realleges and incorporates by reference paragraphs 1 through 25 of this Complaint.

43. Section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3) provides that:

- (a) *Residence.* No person except as otherwise provided in this title, shall be naturalized unless such petitioner * * * (3) during all the periods referred to in this subsection has been and still is a person of good moral character * * * .

44. Defendant is not and has not been a person of good moral character as evidenced by his participation in the persecution and murder of unarmed civilians as described in paragraphs 9 through 11, above.

45. Because defendant was not a person of good moral character, he was ineligible for naturalization under Section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3); his naturalization was therefore unlawful.

46. Because defendant's citizenship was thus illegally procured, it must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

WHEREFORE, plaintiff demands:

1. A declaration that defendant illegally procured his citizenship and Certificate of Naturalization.

2. Judgment revoking and setting aside the February 3, 1954 Order of this Court admitting defendant to United States citizenship, and cancelling defendant's Certificate of Naturalization No. 7131022.

3. Judgment forever restraining and enjoining defendant from claiming any rights, privileges or advantages under any document evidencing United States citizenship.

4. Judgment requiring defendant immediately to surrender and deliver his Certificate of Naturalization No. 7131022 to the Attorney General.

5. Judgment giving plaintiff such other relief as may be lawful and proper.

COUNT IV

Illegal Procurement of Citizenship: Lack of Good Moral Character (False Testimony)

47. Plaintiff realleges and incorporates by reference paragraphs 1 through 25 and 43 of this Complaint.

48. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6), provides that:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

* * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act.

49. Defendant repeatedly gave false testimony to obtain admittance to and citizenship of the United States when he made misrepresentations to and concealed facts from the United States Consulate in Stuttgart, Germany, and when he misrepresented and concealed material facts in his Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention, Application to File Petition for Naturalization, Statement of Facts for Prepa-

ration of Petition, and Petition for Naturalization, as described in paragraphs 12 through 23, above.

50. Because defendant gave false testimony for the purpose of obtaining benefits under the Act, he was not a person of good moral character as defined in Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6).

51. Because defendant was not a person of good moral character, his naturalization was unlawful under Section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3).

52. Because defendant's citizenship was thus illegally procured, it must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

WHEREFORE, plaintiff demands:

1. A declaration that defendant illegally procured his citizenship and Certificate of Naturalization.

2. Judgment revoking and setting aside the February 3, 1954 Order of this Court admitting defendant to United States citizenship, and cancelling defendant's Certificate of Naturalization No. 7131022.

3. Judgment forever restraining and enjoining defendant ~~from~~ claiming any rights, privileges or advantages under any document evidencing United States citizenship.

4. Judgment requiring defendant immediately to surrender and deliver his Certificate of Naturalization No. 7131022 to the Attorney General.

5. Judgment giving plaintiff such other relief as may be lawful and proper.

COUNT V

Procurement of Citizenship by Concealment of Willful Misrepresentation

53. Plaintiff realleges and incorporates by reference paragraphs 1 through 25 of this Complaint.

54. When defendant falsely swore in his application for Immigration Visa and Alien Registration Foreign Service Form that he was born on October 4, 1913 in Kaunas, Lithuania, that he resided in Telsiai, Lithuania during the period 1940-42, that he was married to Sofia Kungys nee Anuskeviciute and that he was not a criminal, and when he failed to list his true wartime occupation(s) and activities, he willfully concealed and misrepresented material facts.

55. When defendant falsely swore on October 23, 1953 in his Application to File Petition for Naturalization that he had not given false testimony to obtain benefits under the immigration and naturalization laws, that he had never committed a crime involving moral turpitude, and that he was born on October 4, 1913 in Kaunas, Lithuania, and that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania, he willfully concealed and misrepresented material facts.

56. When defendant swore in his Petition for Naturalization that he was born on October 4, 1913 in Kaunas, Lithuania, and that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania, he willfully concealed and misrepresented material facts.

57. Defendant thus procured his citizenship and Certificate of Naturalization by willfully misrepresenting and concealing material facts. Because of such actions, defendant's citizenship must be revoked pursuant to Section

340(a) of the Immigration and Nationality Act, 8 U.S.C.
 § 1451(a)

WHEREFORE, plaintiff demands:

1. A declaration that defendant procured his citizenship and Certificate of Naturalization by willful misrepresentation and concealment of material facts.
2. Judgment revoking and setting aside the February 3, 1954 Order of this Court admitting defendant to United States citizenship, and cancelling defendant's Certificate of Naturalization No. 7131022.
3. Judgment forever restraining and enjoining defendant from claiming any rights, privileges or advantages under any document evidencing United States citizenship.
4. Judgment requiring defendant immediately to surrender and deliver his Certificate of Naturalization No. 7131022 to the Attorney General.
5. Judgment giving plaintiff such other relief as may be lawful and proper.

W. Hunt Dumont
 United States Attorney
 District of New Jersey

By: _____
 Donald J. Volkert, Jr.
 Chief, Civil Division

—Respectfully submitted,

/s/ Allan A. Ryan, Jr.
Director

/s/ Neal M. Sher
Deputy Director

/s/ Joseph F. Lynch
Trial Attorney

/s/ Jovi Tenev
Trial Attorney

/s/ Martha Talley
Trial Attorney
Office of Special Investigations
Criminal Division
U.S. Department of Justice
Post Office Box 28603
Washington, D.C. 20005
(202) 633-2502

—
[Caption Omitted in Printing]

**AFFIDAVIT OF GOOD CAUSE
IN SUPPORT OF AMENDED
COMPLAINT
(EXHIBIT 1)**

Charles L. Gittens declares under penalty of perjury
as follows:

I am the Deputy Director (Operations) of the Office
of Special Investigations, Criminal Division, United States
Department of Justice, and as such have access to the
records and information from which the following facts
appear concerning the naturalization of Juozas Kungys
(hereinafter the "defendant"):

1. The defendant was born on September 21, 1915 in Reistru, Lithuania.

2. Defendant resided in Kedainiai, Lithuania during all or part of 1939, 1940 and 1941.

3. In or about July, 1941 defendant, in association with the armed forces of Nazi Germany, participated in the killing of approximately one hundred unarmed civilians in or near the village of Babences (Babenus), Lithuania.

4. In or about July or August, 1941 defendant, in association with the armed forces of Nazi Germany, led an armed group of men which forced approximately three thousand Jewish civilians from their homes in Kedainiai, Lithuania into a ghetto. During said forced ghettoization, the armed group confiscated the property of the Jewish civilian population.

5. In or about August or September, 1941 defendant, in association with the armed forces of Nazi Germany, organized, led and participated in the killing of approximately two thousand unarmed civilian Jewish men, women and children near Kedainiai, Lithuania, by, *inter alia*:

- a. exhorting the men of Kedainiai to participate in said execution;
- b. distributing firearms and ammunition to said execution squad;
- c. collecting and transporting the victims to be killed to the execution site;
- d. forcing the victims into a mass grave, and then shooting them.

6. On or about January 9, 1947 at Stuttgart, Germany defendant executed under oath an "Application for Immi-

gration Visa (Quota)" No. 1530 (Foreign Service Form No. 255) and an "Alien Registration Foreign Service Form" No. 6887153 (Form AR-102) in which he made the following representations:

- a. Defendant swore that he was born on October 4, 1913.
- b. Defendant swore that he was born in Kaunas, Lithuania.
- c. Defendant swore that he resided at Telsiai, Lithuania during the period 1940-1942.
- d. Defendant swore that he was not a criminal.
- e. Defendant swore that during the five-year period preceding January 1947 he had been occupied as a student, dental technician, and farm and forestry worker.
- f. Defendant swore that was married to Sofia Kungys nee Anuskeviciute.

7. On March 4, 1948, the United States Consulate at Stuttgart, Germany issued to defendant Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended.

8. Defendant entered the United States at New York, New York on April 29, 1948 on the aforementioned visa.

9. On or about May 29, 1948, defendant executed under oath an "Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention" No. 119188 (Form N-300) in which he made the following representations:

- a. Defendant swore that his date of birth was October 4, 1913.

- b. Defendant swore that he was born in Kaunas, Lithuania.
- c. Defendant swore that he was married on August 24, 1943 to Sofia Kungys nee Anuskeviciute in Kaunas, Lithuania.

10. On or about May 11, 1953, defendant executed an "Application to File Petition for Naturalization" No. 92961 and an attached "Statement of Facts for Preparation," (together comprising Form N-400) in which he made the following representations:

- a. Defendant swore that he had not given false testimony to obtain benefits under the immigration and naturalization laws.
- b. Defendant swore he had never committed a crime involving moral turpitude.
- c. Defendant swore that his date of birth was October 4, 1913.
- d. Defendant swore that he was born in Kaunas, Lithuania.
- e. Defendant swore he was married on August 24, 1913 to Sofia Kungys nee Anuskeviciute in Kaunas, Lithuania.

11. On October 23, 1953, defendant swore to the truth of the statements contained in Form N-400.

12. On October 23, 1953, defendant executed under oath a "Petition for Naturalization" No. 92961 (Form N-405) in which he made the following representations:

- a. Defendant swore that his date of birth was October 4, 1913.
- b. Defendant swore that was born in Kaunas, Lithuania.

- c. Defendant swore he was married on August 24, 1943 to Sofia Kungys nee Anuskeviciute in Kaunas, Lithuania.

13. On February 3, 1954, this Court granted defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 7131022.

14. Throughout the process of his immigration and naturalization, defendant willfully concealed and misrepresented at least the following material facts:

- a. His date of birth;
- b. His place of birth;
- c. His place of residence;
- d. His participation in the acts of persecution and murder described in paragraphs 3 through 5, above;
- e. His wartime occupation and activities during the period 1942-1944;
- f. His date and place of marriage.

15. There exists good cause for the institution of proceedings against the defendant to revoke and set aside the order admitting the defendant to naturalization and to cancel his Certificate of Naturalization, pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), on the grounds that:

- a. the defendant procured his naturalization by concealment of material facts or by willful misrepresentation;
- b. the defendant illegally procured his naturalization in that he lacked the statutory requirement of good moral character, Section 316 of the Immigration and Nationality Act, 8 U.S.C. § 1427;

- c. the defendant illegally procured his naturalization by unlawful admission into the United States.

16. The defendant's last-known place of residence is 778 Grove Street, Clifton, New Jersey.

DECLARATION IN LIEU OF JURAT
(28 U.S.C. § 1746)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 17, 1982.

/s/ Charles L. Gittens
Deputy Director (Operations)
Office of Special Investigations
Criminal Division
U.S. Department of Justice

PLAINTIFF'S EXHIBIT A-1

Forma 130 N

1944. mt. Islandia 26 men.

Laikinas asmens liudijimas 11840. Nr.

Gatoja iki 1944 mt. snalio 26 mən

Reverso Kungys Verso Friza



Jicolas
 "Gimimo data: 1913 m.
 arš amžius
 spalio 4 d., Kaunas
 if vieta
 Liekuvis
 Užsiėmimas
 karnautas
 Tautybė
 vėdla
 Seimynos padėtis
 Kaunas, Lelijači 6 m.
 Gyvenamoji vieta
 vietų nuėėvė
 Šis liudijimas duotas remiantis
 pasė duos Kauno m. Burėnis
 1939.7.3. Nr. 34865.

~~Secretariat~~

Translation from Lithuanian

Municipality of Kaunas
Bureau of Passports for
the Interior

Form No 130

April 26, 1944

Provisional Identity Card No 11840.
Valid till October 26, 1944

<i>Surname</i> Kungys	<i>Name</i> Juozas
<i>Father's Name</i> Juozas	<i>Date of Birth</i> October 4, 1913 or age and <i>Place of Birth</i> Town of Kaunas
<i>Nationality</i> Lithuanian	<i>Profession</i> employee
<i>Marital status</i> married	
<i>Place of residence</i> Kaunas, Green St. 6	

This card is issued on basis dilapidated identity card No. 34865, issued on January 3rd 1939 by the Burgomaster of the Town of Kaunas.

(Picture)

	(Signed) <i>Burgomaster of City of Kaunas</i>
Rubber stamp	Signature of issuing official

(Signed)
Passport Official
Secretary

For conformity of translation to original:
January 10, 1947
(SEAL)

/s/ Illegible

PLAINTIFF'S EXHIBIT A-IT

Form #130

Seal:

Municipal Government of the City
of Kaunas

Bureau of Internal Passes

26 April 1944

Temporary Personal Identification No. 11840

(Identification is) valid till 26 October 1944

Stamp:

Personal features

Height: *Medium*Face: *Oblong*Eyes: *Blue*Hair: *Fair*

Special: ———

Last Name *KUNGYS* First Name *JUOZAS*
 Father's name *JUOZAS*. Birth date or age and birth
 place *1913 year 4 October. Kaunas.*
 Nationality *Lithuanian* Occupation *Office-worker*
 Family status *Married*
 Place of Residence *6 Zalioji Street, Kaunas*

This certificate is issued by evidence to replace worn
 out old I.D. pass No. 34865 which was issued by the
 Mayor of the City of Kaunas on 3 January 1939.

Signature

Signature of an officer who issued this certificate

Seal:

The Mayor of the City of Kaunas

Signed: [illegible]

Signature of official issuing certificate

Signed: [illegible]
Secretary

Stamp:

Registered

Kaunas

City

Birstonas

Street

Building No. 9 Apt. No. 3

30 April 1944

registered (signature)

PLAINTIFF'S EXHIBIT A2

Lithuanian Ex-Political Prisoners

1946, 18 June.

Central Committee

No. 228246

Certificate

This is to certify that Mr. Juozas Kungys, born on 4 October 1913 at Kaunas, Lithuania, took an active part in the Lithuanian anti-Nazi resistance movement and was persecuted by the gestapo.—

(SEAL)

/s/ V. Vitiekunas

Secretary of the Lithuanian
Ex-Political Prisoners
Central Committee

PLAINTIFF'S EXHIBIT A3

AMERICAN FOREIGN SERVICE

No. 1530

AT Stuttgart, Germany

APPLICATION FOR IMMIGRATION VISA (QUOTA)

I, the undersigned *APPLICANT FOR AN IMMIGRATION VISA*, being duly sworn, state that my full and true name is *JUOZAS KUNGYS*; that I am 33 years of age, of the *male* sex and *Lithuanian* race; that I was born on the 4th day of October 1913, at *Kaunas, Lithuania*; that since reaching the age of 14 years I have resided at the following places, during the periods stated, to wit:

July 1946—present: Fellbach-Stuttgart, Germ.

1933-1938: Telsiai, Lithuania

1938-1940: Kaunas, Lithuania. 1940-1942: Telsiai, Lith.,

1942-1944: Kaunas, Lith.

Oct. 1944—July 1945: Poltringen, Germ.

July 1945—July 1946: Gueltstein, Germany.

That I am [married], and the name of my [wife] is *Sofija KUNGYS, nee ANUSKEVICJUTE*, who was born at *Kedainiai, Lithuania*; and resides at *Fellbach-Stuttgart, Germany*.

That the names, dates of birth, and places of residence of my minor children are:

none

That my calling or occupation is *dental technician*; that my height is 5 feet and 6 inches; my complexion *medium* color of hair, *blonde*; color of eyes, *blue*; and that I bear the following marks of identification: *none*; that I am [able] to speak *Lithuanian, German*, [able] to read *Lithuanian, German*, and [able] to write the (Name of language or dialect) *Lithuanian, German*; that the names and addresses of my parents are as follows;

Mother, *Ona, nee JURGEIAJTE*; address, *Taurage, Lithuania*

Father, *Juozas KUNGYS*; address, *Taurage, Lithuania*

That neither of my parents is living, and that the name of my nearest relative in the country from which I come is *not applicable*, whose relationship is and whose address is

That my port of embarkation is *Bremerhaven, Germany*; that I shall enter the United States at the port of *New York*; that my final destination beyond such port is *Brooklyn, N.Y.*; and that I do not have a ticket through to such destination; that my passage was paid for by *xxx* whose address is ; that I intend to join [relative] *Mr. Mecys ANUSKEVICIUS* whose address is *189 South 2nd Street, Brooklyn 11, N.Y.*

That my purpose in going to the United States is to *reside*, and I intend to remain *permanently*; that I have *not* been in prison or almshouse; that i have *not* been insane; that my [father/mother] [have] *not* been in an institution or hospital for the care and treatment of the insane; that I have *not* applied for an immigration or passport visa at any American consulate, either formally or informally.

That, except as hereafter noted, I am not a member of any one of the following classes of individuals excluded from admission to the United States under the immigration laws: (1) Idiots; (2) imbeciles; (3) feeble-minded; (4) epileptics; (5) insane persons; (6) persons having had previous attacks of insanity; (7) persons with constitutional psychopathic inferiority; (8) persons with chronic alcoholism; (9) paupers; (10) professional beggars; (11) vagrants; (12) persons afflicted with tuberculosis; (13) persons afflicted with a loathsome or dangerous contagious disease; (14) criminals; (15) polygamists; (16) anarchists; (17) persons who believe in or advocate the overthrow by force or violence of the Government of the United States; (18) persons inadmissible under the provisions of section 3 of the Act of February 5, 1917; (19) persons inadmissible under the provisions of the act en-

titled, "An Act to Exclude and Expel from the United States Aliens who are Members of the Anarchistic and Similar Classes," approved October 16, 1918, as amended by the act approved June 5, 1920; (20) prostitutes; (21) procurers; (22) contract laborers; (23) persons likely to become public charges; (24) persons previously excluded from admission to the United States at a port of entry; (26) persons whose passage paid by another; (27) unaccompanied children; (28) natives of Asiatic barred zone; (29) illiterates; (30) aliens ineligible to citizenship; or (31) persons repatriated at the expense of the U.S. Government 26

That I claim to be exempt from exclusion on account of the class or classes noted above, for the reasons following, to wit: *My passage is to be paid for by the Catholic Committee for Refugees.*

I am not a member of any other excludable class.

That I am the father, mother, or husband by marriage occurring after July 1, 1932/unmarried child under 21 years or wife, of *xxx* who is a citizen/an alien resident, lawfully admitted for permanent residence, of the United States, *xxx* years of age, and resides at (City, States, street, and number) That because of the relationship aforesaid I am entitled to and claim the preference provided for in paragraph (1)(2) of Subdivision (a) of Section 6 of the Immigration Act of 1924, as amended *xxx*

That I am aware that the Deportation Act of March 4, 1929, provides in part that an alien who enters the United States in an illegal maner, or who eludes examination or inspection by immigration officials, or who obtains entry to the United States by a willfully false or misleading representation or willful concealment of a material fact shall be punishable by fine or imprisonment, or both; and that the Immigration Act of 1924 provides in part that a person who knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations issued thereunder shall be punishable by fine or imprisonment, or both.

Available documents required by the Immigration Act of 1924, as amended, are filed herewith and made part hereof, as follows:

Police dossier available.

Birth Certificate not available.

WHEREFORE, I apply for an Immigration Visa as a quota immigrant, pursuant to the provisions of the Immigration Act of 1924, as amended.

/s/ Juozas Kungys
(Signature of applicant)

[SEAL] Subscribed and sworn to before me this
9th day of *January*, 1947.

/s/ Frank K. Schilling
Vice Consul
of the United States of America

*Nonpreference (x) Preference. Section 6(a)(1) — Sec-
tion 6(a)(2) — American Consulate

(Quota Nationality) Lithuanian
at *Stuttgart, Germany*

QUOTA IMMIGRATION VISA No. 114

Date *Mar 4 1948*

SEEN:

The Bearer,

JUOZAS KUNGYS
who is of *Lithuania*

(Citizen or subject)

nationality, having been seen and examined, is classified as a quota immigrant and is granted this Immigration Visa pursuant to the Immigration Act of 1924, as amended.

The validity of this Immigration Visa expires on
4 JUL 1948

/s/ Frederick J. Mann
Consul of the
United States of America

Fee \$9.
Fee No. 1312

Immigrant identification card No. issued.

PICTURE

Passport No. or other travel document
Certificate of Identity in lieu
of Passport A.25507

Issued to *JUOZAS KUNGYS*

Issued by *American Consulate
Stuttgart, Germany*

Date Jan. 9, 1947

Valid until Jul 1949 -

NOTE—This Immigration Visa will not entitle the person to whom issued to enter the United States if, upon arrival in the United States, he is found to be inadmissible to the United States under the Immigration Laws. (Subdivision (g), sec. 2, Immigration Act of 1924.)

PLAINTIFF'S EXHIBIT A4

6887153 ALIEN REGISTRATION
FOREIGN SERVICE FORM

1.* My name is *JUOZAS KUNGYS*

* I have also been known by the following names
none (include maiden name if a married woman
professional names, nicknames, and aliases):

- 2.* My address in the United States will be
129 South 2nd Street
Brooklyn 11, N.Y.
- 3.* (a) *I was born on October 4, 1913*
 (b) *I was born in (or near) Kaunas, Lithuania*
- 4.* I am a citizen or subject of *Lithuania*
- 5.* (a) I am a (check one): (b) my marital status is
 (check one) Male *xx* Female — Single — Mar-
 ried X Widowed — Divorced
 (c) My race is (check one) White X Negro — Japa-
 nese — Chinese — Other —
6. I am 5 feet 6 inches in height, weigh 138 pounds
 have blonde hair, and blue eyes.
- 7.* My first arrival in the United States was on *no*
 previous entry.
- 8.* (a) I have lived in the United States a total of *no*
 years.
 (b) I expect to remain in the United States *perma-*
 nently.
9. (a) My usual (or previous) occupation is *dental*
 technician.
 (b) My present occupation is *dental technician.*
10. (a) I intend to be engaged in the following activities
 in the United States: *unknown.*
 (b) I have been within the past 5 years, engaged in
 the following activities; *student, dental techni-*
 cian, farmer and forestry work.

11. My military or naval service has been *Lithuania Army from 1938 to 1939.*
12. *I have not* applied for first citizenship papers in the United States. Date of application ———.
13. I have the following specified relatives living in the United States:
Parent(s) *none* Husband or wife *no* Children *no*
14. *I have not* been arrested or indicted for, or convicted of any offense (or offenses).
15. Within the past 5 years I *have not* been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering in the United States, the political activities, public relations, or public policy or any other government.

**AFFIDAVIT FOR PERSONS
14 YEARS OF AGE AND OLDER**

RIGHT INDEX FINGER I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

/s/ Juozas Kungys
(Signature of Registrant)

Subscribed and sworn to (or affirmed)
before me this 9 day of *Jan* 1947 at the place
designated by the official seal below

/s/
(Registering Official)

Frank K. Schilling

I certify that the within named registrant arrived in the United States on the *S.S. MARINE FLASHER* on *APR 29, 1948* at the port of *NEW YORK, N.Y.* and was inspected by me and duly [admitted].

/s/

(IMMIGRATION OFFICER)

PLAINTIFF'S EXHIBIT A5T

Der Burgermeister der Stadt Fellbach

Fellbach, den January 14th 1947

Certificate of good conduct.

Herewith we testify the dental-technician Joseph Kungys, born October 4th 1913 at Kaunas/Lithuania, living Fellbach Blucherstr. 16 that since July 10th 1946 no disadvantageous matter of facts, especially previous conviction are known or listed at the police record.

For presentation to the
American Consulate.

Fellbach, January 14th 1947
The Burgomaster as police
authority

sig. I. A. Greeb
Chief of the police.

PLAINTIFF'S EXHIBIT A6

Kirkheim-Teck, January 18th.

1947

(SEAL)

No. 357.

Excerpt from the act No 87 of the National Delegate of the Vatican for the Lithuanians in Germany and Austria.

The National Delegate of the Vatican for the Lithuanians in Germany and Austria, according to the documents submitted to him and, according to the depositions of sworn witnesses drew up on January 16, 1947, the following birth certificate (the original of which has been left in Lithuania) of Juozas KUNGYS:

"On October, nineteen hundred thirteen (1913.X.), a child named Juozas, born on October 4, 1913, at Kaunas city (in Lithuania), of the legale matrimony of Juozas Kungys and Ona Jurgelaite, was baptized in the Roman Catholic Church of Holy Trinity at Kaunas."

(SEAL)

/s/ [illegible]

Lithuanians in Germany and Austria
National Delegate of the Vatican

PLAINTIFF'S EXHIBIT A7

Application for a Certificate of Arrival and Preliminary
Form for a Declaration of Intention

• • •

IMMIGRATION AND NATURALIZATION SERVICE

Date May 29, 1948

35592

I, *Kungys, Juozas* residing at *58 Ten Eyck, Brooklyn 6, New York* desire to declare my intention to become a citizen of the United States in accordance with the naturalization laws of the Court at *New York, N.Y.* I submit here the statement of facts to be used in making such declaration, and three photographs of myself, each of which I have signed.

I hereby apply for a Certificate of Arrival (if required) showing my lawful entry into the United States for permanent residence.

- (1) I arrived in the United States through the port of *New York, N.Y.*

under the name of *Kungys, Juozas* on *May 29th 1948*
on the vessel *SS Marine Flasher*

- (2) (if arrival by ship) Name of steamship line was *United States Lines*

first, second, or third cabin *third*. I arrived as a passenger, stowaway, seaman, member of crew, or otherwise *passenger*.

- (3) The ticket on which I came to this country was bought at *New York*.

- (4) The steamship ticket on which I traveled was in the name of

- (5) I have — been absent from the United States as follows: —

- (7) My father's full name was *Kungys, Juozas*.

- (8) My mother's maiden name was *Jurgelajte Ona*.

- (9) (If a married woman) My maiden name was —

- (10) My last foreign residence was *Fellbach, Germany*.

- (11) The place where I took the ship or train which landed me in the United States was *Bremerhaven, Germany*.

- (12) I traveled on (an immigration visa a passport, or permit to reenter) *an immigration visa*.

- (13) I was — examined by United States immigration officers at
- (14) (If not examined, state why, and give the circumstances of your entry)
- (15) The person in the United States to whom I was coming was *Stanley Swanicka*.
- (16) The place in the United States to which I was going was *62 Third St., Lyndhurst, N.J.*

* * *

STATEMENT OF FACTS TO BE USED IN MAKING MY DECLARATION OF INTENTION

- (1) My full name is *Kungys, Juozas*.
- (2) My place of residence is *58 Ten Eyck, Brooklyn 6, N.Y.*
- (3) My occupation is *dental technician*.
- (4) I am *33* years old.
- (5) I was born on *October 4th 1913* in *Kuanas, Lithuania*.
- (6) My personal description is as follows: Sex *male*; color *white*; complexion —; color of eyes *blue*; color of hair *blonde*; height *5 feet 6 inches*; weight *142 pounds*; visible distinctive marks *none*; *Lithuanian* race *white*; present nationality *Lithuanian*.
- (7) I am — married; the name of my wife or husband is *Anuskeviciute, Sofija*, we were married on *August 24th 1943* at *Kuanas, Lithuania* he or she was born at *Ketainiai, Lithuania* on *December 3rd, 1913* and entered the United States at New York, N.Y. on *April 29th 1948* for permanent residence in the United States, and now resides at *Brooklyn 6, N.Y.*
- (8) I have *not* children; and the name, sex, date, and place of birth, and present place of residence of each of said children who is living are as follows:
- (9) My last place of foreign residence was *Fellbach, Wurttemberg, Germany*.
- (10) I emigrated to the United States from *Bremerhaven*.

- (11) My lawful entry for permanent residence in the United States was at *New York, N.Y.* under the name of *Kungys, Juozas* on *April 29th 1948* on the *Marine Flasher*.
- (12) Since my lawful entry for permanent residence I have *not* been absent from the United States, for a period or periods of 6 months or longer, as follows:
- * * *
- (13) I have — heretofore made declaration of intention number — on — at — in the —.
- (14) It is my intention in good faith to become a citizen of the United States and to reside permanently therein. (15) I will, before being admitted to citizenship renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at the time of admission to citizenship I may be a subject or citizen. (16) I am not an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage: nor a disbeliever in or opposed to organized government: nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (17) I certify that the photographs attached to this application are a likeness of me and were signed by me.

I CERTIFY that the above statement of facts is true to the best of my knowledge and belief.

NOTE—have you enclosed

THREE PHOTOGRAPHS OF YOURSELF?

/s/ Juozas Kungys
(Signature of applicant)

(Address at which applicant
receives his mail)

PLAINTIFF'S EXHIBIT A10

APPLICATION TO FILE PETITION FOR
NATURALIZATION

I desire to file a petition for naturalization in the
Court at *Newark, New Jersey*

JOUZAS KUNGYS

264 Ferry Street

Newark, Essex County, New Jersey

INSTRUCTIONS TO THE APPLICANT

IMPORTANT.—Under the naturalization laws, citizenship may be revoked for concealment of a material fact or for willful misrepresentation in connection with the naturalization proceedings. It is important therefore that you fill our pages 1, 2, 3, and 4 of this form completely and as accurately as possible, using ink or a typewriter. If you do not have enough room to answer a question, continue your answer on another sheet of paper and show the number of the question you are continuing.

(1) In what places in the United States have you lived during the last 5 years?

FROM—	TO—	STREET ADDRESS	CITY	and STATE
April 1948	May 1948	184½ New York Ave.	Newark	5, N.J.
May 1948	until now	264 Ferry Street	Newark,	N.J.

(2) What were the names, addresses, and occupations (or types of business) of your employers during the last 5 years?

		EMPLOYER'S	OCCUPATION
FROM—	TO—	NAME ADDRESS	OR TYPE OF BUSINESS
June 1948	June 1949	Congoleum Nairn Kearny, NJ	laborer
June 1949	Nov. 1949		Unemployed
Nov. 1949	Dec. 1949	Bamberger Co. Newark, NJ	packer
Dec. 1949	Feb. 1950		Unemployed
Feb. 1950	until now	Eastern Motor Express Jersey City, NJ	checker

(3) How many times have you been married *one*. How many times has your husband or wife been married *one*. If either of you have been married more than once, fill in the following information for each previous marriage.

(4) Have you ever been an inmate of an insane asylum or similar institution or have you ever been treated for any mental illness? —yes ☒ no.

(5) Have you ever, in the United States or in any other country, been arrested, charged with violation of any law or ordinance, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation or parole, or forfeited collateral for any act involving a felony, misdemeanor, or breach of any public law or ordinance? —yes ☐ no. ☒ . . .

(7) What organizations in the United States or in any other country have you been a member of during the last 10 years? (If none, write "none")

- | | | |
|---------------------------------|-----|-----|
| (a) Ateitis Lith. Cath. Society | (b) | (c) |
| (d) | (e) | (f) |
| (g) | (h) | (i) |
| (j) | (k) | (l) |

(8) What organizations in the United States or in any other country have you been a member of before the last 10 years? (If none, write "none")

- (a) the same
- (b) Paraseris-Lithuanian Catholic Youth Society
- (c) Sauliai-Lith Patriotic Military Train. Society
- (9) Do you owe a tax of any kind to the Federal government? — yes ☐ no ☒
- (10) Have you ever filed a Federal Income Tax Return ☒ yes — no. If "Yes" give the last year filed 1952

- (11) Have you ever voted or otherwise represented yourself to be a United States citizen? — yes *X no*
- (12) Was your father or mother ever a citizen of the United States? — yes *X no* If "Yes" give full information.
- (13) Have you ever been registered and fingerprinted under the Alien Registration Act of 1940 or any other later Act? *X yes* — no. If "Yes" write the number of your Alien Registration Receipt Card inside the boxes at the top of pages 1 and 3, and the exact name shown on the card.
- (14) If male, did you register under the Selective Service Law of 1917, 1918, 1940, 1943, 1951 or later Draft laws? — yes *X no* If "Yes" give date ———. Were you ever exempted from service because of — conscientious objections: — alienage other?
- (15) If you ever served in the Armed Forces of the United States, state branch ——— from ———, 19— to — 19—; Service No. ———; type of separation ———; reason for separation.— alienage; — conscientious objections; other —
- (16) If the law requires it, are you willing (a) to bear arms on behalf of the United States? *X yes* — no; (b) to perform noncombatant services in the Armed Forces of the United States? *X yes*; — no: (c) to perform work of national importance under civilian direction *X yes* —no.
- (17) Have you ever deserted from the military or naval forces of the United States while this country was at war? — yes no. Have you ever left the United States or the jurisdiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? — yes — no.
- (18) Are you now or have you ever—(Answer "Yes" or "No")

- (a) been a habitual drunkard? *no*
 - (b) derived income principally from illegal gambling activities *no*
 - (c) given false testimony to obtain benefits under the immigration or naturalization laws? *no*
 - (d) been a polygamist or practiced or advocated polygamy? *no*
 - (e) been a prostitute, or engaged in or received support or the proceeds from prostitution, or procured or imported or attempted to procure or import persons for prostitution or any other immoral purpose, or come to the United States to engage in any other unlawful commercialized vice? *no*
 - (f) knowingly and for gain encouraged or aided any alien to enter the United States illegally? *no*
 - (g) committed a crime involving moral turpitude? *no*
-

STATEMENT OF FACTS FOR
-PREPARATION OF PETITION

- (1) My full, true, and correct name is *JUOZAS KUNGYS*
- (2) My present place of residence is *264 Ferry Street, Newark, Essex County, N.J.*
- (3) My occupation is *dock-man*.
- (4) I am *40* years old.
- (5) I was born on *October 4, 1913* in *Kaunas, Lithuania*.
- (6) My personal description is as follows: Sex *male*, complexion *fair*, coloring of eyes *blue*, color of hair *lt. brown*, height *5 feet 6 inches*; weight *143 pounds*, visible distinctive marks *none* country of which I am a citizen, subject, or national *Lithuania*.

- (7) I am married; the name of my wife or husband is *Sofija nee Anuskeviciute* and we were married on *August 24, 1943* in *Kaunas, Lithuania*, he or she was born at *Kedainiai, Lithuania* on *December 3, 1913*. We entered the United States at *New York, N.Y.* on *April 29, 1948* for permanent residence in the United States and now resides at *with me*.
certificate no. _____ or became a citizen by
- (8) I have ~~no~~ children; and the name, sex, place and date of birth, and present place of residence of each said children who is living, are as follows:
- (9) My lawful admission for permanent residence in the United States was at *New York, N.Y.* under the name of *Juozas Kungys* on *April 29, 1948* on the *S. S. Marine Flasher*.
- (10) Since such lawful admission, I have not been absent from the United States for a period or periods of 6 months or longer except as follows:
- (11) I have resided continuously in the United States of America since *April 29, 1948* and continuously in the State of New Jersey where I now live since *May 1948* and during the past years I have been physically present in the United States for an aggregate period of 60 months.
- (12) I (have, *have not*) heretofore made petition for naturalization No. _____ on _____ in the _____ Court, and such petition was denied because _____
- (13) I wish the naturalization court to change my name to _____

. . .

(1st witness) *Adele E. Laukzemis, Printer*
residing at *199 New York Ave., Newark, NJ*

(2nd witness) *Joseph Kleukauskas Club Mgr.*
residing at *201 New York Ave., Newark, NJ*

United States 10-22-48

State 10-22-48

Physical presence 31 mos.

Examiner _____

- (14) My father's full name is/was *Joseph Kungys*.
- (15) My mother's maiden name was *Anna Juggilias*.
- (16) My last place of foreign residence was *Fellbach, Germany*.
- (17) I emigrated to the United States from the port of *Bremerhaven, Germany*.
- (18) The person in the United States to whom I was coming was *Stanley Swanicke*.
- (19) The place in the United States to which I was going was *Brooklyn, N.Y.*
- (20) The names of some of the passengers or other persons I traveled with, including my own family and their relationship to me, if any, are *Sofija Kungys, wife*.

Date: *May 11, 1953*

/s/ *Juozas Kungys*

Signature of Applicant

264 Ferry St., Newark, N.J.

Address at which applicant resides

* * *

NOTE CAREFULLY.—This application must be sworn to before an officer of the Immigration and Naturalization Service at the time you appear before such office for examination on this application.

AFFIDAVIT

I, *JUOZAS KUNGYS* do swear (affirm) that I know the contents of this application comprising pages 1 to 4 inclusive, and the supplements thereto, Forms No. _____, subscribed to by me; that the same are true to the best of my knowledge and belief, and that corrections numbered (1) to (6) were made by me or at my request, and that this application was signed by me with my full, true, and correct name.

/s/ *Juozas Kungys*

Subscribed and sworn to before me by the above-mentioned applicant at the preliminary interrogation (examination) at *Newark, N.J.* this *23* day of *Oct. 1953*. I certify that the above applicant stated in my presence that he had (heard) read the foregoing application and understands the contents thereof, before verification.

/s/ *Manuel E. Botiello*
Act'g Nat. Examiner

PLAINTIFF'S EXHIBIT A11

No. 92961

PETITION FOR NATURALIZATION

To The Honorable *District Court of the United States at Newark, N.J.* This petition for naturalization, hereby made and filed, respectfully shows:

(1) My full, true and correct name is *JUOZAS KUNGYS*.

(2) My present place of residence is *264 Ferry St., Newark, N.J.* (3) My occupation is *bookman*.

(4) I am *40* years old. (5) I was born *October 4, 1913* in *Kaunas, Lithuania*.

(6) My personal description is as follows: Sex *male*, complexion *fair*, color of eyes *blue*, color of hair *lt. brown*, height *5 feet 6 inches*, weight *143 pounds*, visible distinctive marks *none*: country of which I am a citizen, subject, or national *Lithuania*. (7) I am married: the name of my wife is *Sofija nee: Anuskeviciute*, we were married on *August 24, 1943* at *Kaunas, Lithuania*. She was born at *Kedainiai, Lithuania* on *December 3, 1913* and entered the United States at *New York, New York* on *April 29, 1948* for permanent residence in the United States and now resides at *with me in Newark, New Jersey* and was naturalized on _____ certificate no. _____; or became a citizen by _____.

(8) I have ~~no~~ children; and the name, sex, date and place of birth, and present place of residence of each said children who is living, are as follows:

(9) My lawful admission for permanent residence in the United States was at *New York, New York* under the name of *Juozas Kungys* on *April 29, 1948* on the *S. S. Marine Flasher*.

. . .

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen. (12) It is my intention to reside permanently in the United States. (13) I am not and have not been for a period of at least 10 years immediately preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch affiliate or subdivision thereof nor have I during such period engaged in or performed any of the acts or activities prohibited by that act. (14) I am able to read, write and speak the English language (unless exempted therefrom). (15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. I am willing, if required by law, to bear arms on behalf of the United States, or to perform noncombatant service in the Armed Forces of the United States, or to perform work of national importance under civilian direction (unless exempted therefrom). (16) I have resided continuously in the United States of America for the term of 5 years at least immediately preceding the date of this petition, to wit, since *April 29, 1948* and continuously in the State in which this petition is made for the term of 6 months at least immediately preceding the date of this petition, to wit, since *May 1948* and during the past 5 years I have been physically present in the United States for at least one-half of that period. (17) I have ~~not~~ heretofore made petition for nat-

uralization: No _____ on _____ at _____
in the _____ Court, and such petition was denied by that
Court for the following reasons and causes, to wit _____.

(18) Attached hereto and made a part of this, my petition
for naturalization, are the affidavits of at least two verify-
ing witnesses required by law.

(19) Wherefore I, your petitioner for naturalization, pray
that I may be admitted a citizen of the United States of
America, and that my name be changed to ~~none~~ I, afore-
said petitioner, do swear (affirm) that I know the contents
of this petition for naturalization subscribed by me, and
that the same are true to the best of my knowledge and be-
lief, and that this petition is signed by me with my full, true
name: SO HELP ME GOD.

ALIEN REGISTRATION NO. *A 6 887 153*

/s/ Juozas Kungys

[AFFIDAVITS OF WITNESSES OMITTED]

Adele E. Laukzemis, occupation Printer
199 New York Ave., Newark, N.J.
Joseph Kieukauskas, Club Mgr.
201 New York Ave., Newark, N.J.

• • •

RESULT OF EXAMINATION

English speaks *ok* Reads *OK* Writes *OK* Classes *no*
Government *OK*

Documents submitted:

OK

Attachment—Constitution: *OK*

Petitioner and above witnesses sworn by me on *10-23-53*.

Recommendation of preliminary examiner *OK-BCC*

(Signature) /s/ Manuel E. Botiello

Recommendation of designated examiner *G*

(Signature) /s/ J. Goldberg

INVESTIGATION WAIVED JG

—

PLAINTIFF'S EXHIBIT B17T

The Kedainiai Branch of the Bank of Lithuania

[to] Mr. Director

[from] Employee JUOZAS KUNGYS
Residing at No. 3 Radvila St.
Kedainiai

A Request

I am requesting Mr. Director, that you relieve me of my service with the bank effective the 16th of October of this year.

With Respect
[signed] (illegible)

Kedainiai

10 October 1941

[handwritten]

Informed by Order No. 25

17 October 1941

PLAINTIFF'S EXHIBIT A18T

CERTIFICATION

This is to certify that *KUNGYS, JUOZAS*, son of *JUOZAS*, from the village of *Reistra*, from the township of *Silale*, county of *Taurage*, actually studies at the (Priests) Seminary of Telsiai.

This certificate is valid until 31 December 1942.

Telsiai, 30 November 1941.

Seal: Rector the Priests'

Seminary of Telsiai [illegible]

/signed/ [illegible]

Rector of the Seminary

/signed/ [illegible]

Secretary

*Translator's Note: The blank portions of the certificate are unused extension forms and a blank repetition of the above.

NOTE: Items underlined are handwritten.

GOVERNMENT EXHIBIT J 13

CERTIFICATION

I Dirk Von Haeften, Counselor of the Embassy of the Federal Republic of Germany in Washington, D.C., U.S.A., do hereby certify that the signature and the seal of the Office of the Mayor, Municipality of Ammerbuch Tubingen District for the Community of Poltringen, affixed to this document, are genuine and the Office of the Mayor is authorized by the laws of the Federal Republic Germany to attest to the genuineness of copies made of documents that are held at the Office of the Mayor, Municipality of Ammerbuch Tubingen District for the Community of Poltringen.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Embassy of the Federal Republic of Germany in Washington, D.C., this 10th day of June 1982

(SEAL)

/s/ Dirk Von Haeften



Nr. 9tr.	Familien-Name		Geburtsort (mit näherer Angabe des Ortes, Ort, Kreis Reg.-Bezirk ufm.)	Geburts- tag	Stand ober Befehl	Reli- gion
	des	Vornamen				
607	Kimppe	Johann	4.10.1843 Kopp			Ang.
608	Kimppe	Anna	18.11.1843 Kopp			Ang.
609	Kimppe	Anna	18.11.1843 Kopp			Ang.
610	Kimppe	Anna	18.11.1843 Kopp			Ang.
611	Kimppe	Anna	18.11.1843 Kopp			Ang.
612	Kimppe	Anna	18.11.1843 Kopp			Ang.
613	Kimppe	Anna	18.11.1843 Kopp			Ang.
614	Kimppe	Anna	18.11.1843 Kopp			Ang.
615	Kimppe	Anna	18.11.1843 Kopp			Ang.
616	Kimppe	Anna	18.11.1843 Kopp			Ang.
617	Kimppe	Anna	18.11.1843 Kopp			Ang.
618	Kimppe	Anna	18.11.1843 Kopp			Ang.
619	Kimppe	Anna	18.11.1843 Kopp			Ang.
620	Kimppe	Anna	18.11.1843 Kopp			Ang.
621	Kimppe	Anna	18.11.1843 Kopp			Ang.
622	Kimppe	Anna	18.11.1843 Kopp			Ang.
623	Kimppe	Anna	18.11.1843 Kopp			Ang.
624	Kimppe	Anna	18.11.1843 Kopp			Ang.

[illegible]



GOVERNMENT EXHIBIT J13T
CERTIFICATION OF TRANSLATION

Pursuant to 28 U.S.C. § 1746, I certify under the penalty of perjury that the attached document in English, handwritten Extract gram Register of Residents of Ammerbuch is a true and accurate translation of the designated portions of the attached document in German, to the best of my knowledge and belief.

Executed this 9th day
of June, 1982

/s/ George W. Garand
Chief Historian
U.S. Dept. of Justice
Office of Special Investigations

Continuing Number	Last Name	First Name	Position or Occupation	Date of Birth	Place of Birth (list in detail about Registration Office, District Office, Regional Office, etc)	Single Married Widowed Divorced Separated
-------------------	-----------	------------	------------------------	---------------	--	---

[sic]

4.10.1913

[original

crossed out

21.9.1908]

3.12.1919

Kaunas, Taurage

Kaunas, Taurage

Plant
Manager

Dentist

KUNGYS JOSEF

KUNGYS SOFIE

ANUSKEVICIUTE

607

608

Nationality	Arrival coming on	Report of Address at Time of Arrival and Departure	Departure on to
[illegal] Community Civil Rights	16 Nov 1944	[Stamp]: Certified True Copy Ammerbuch, 18 Feb 1982 The Mayor's Office [Signature]: illegible	
Lithuanian	Tubingen	[Stamp]: Municipality of Ammerbuch Tubingen District Community of Poltringen	

DEFENDANT'S EXHIBIT 13T

The Wuerrtemberg Minister of the Interior

Stuttgart, 18 December 1944

No. X 4547 KUNGYS, nee ANUSKEVICIUTE, SOFIA/1.

Mrs. SOFIA KUNGYS, nee ANUSKEVICIUTE

Dentist [female]

currently in Poltringen, near Tuebingen

Schloss 147

To your letter dated 17 November 1944

Subject: Performance of your dental profession in the German Reich & Beil.

Your petition has been turned over to the German Dental Association, Sub-District Wuerrtemberg, Stuttgart —W, Rotebuehlstr. 97, for appropriate action. You will be notified by them.

By order

/s/ MAYN[?]

[Envelope]

[Cancellation Stamp illegible]

Wuerrtemberg Ministry of the Interior

To

Mrs. SOFIA KUNGYS, nee
ANUSKEVICIUTE

Dentist [female]

*14 currently Poltringen near
Tuebingen Schloss 147*

XI 44 Mue 0/1266 2000

PLAINTIFF'S EXHIBIT J1

Tübingen, den 13. Februar 1945.

A r z t.

nderramt-

Herrn Bürgermeister

in Tübingen.

Betreff: Ausländerpolizei.

Beil.: 1. Pass.

Dort wohnte Ausländer hat bis zum

Aufenthaltserlaubnis ohne besondere Bedingungen und Auflagen erhalten

Ich erlaube an Ausländer teil. Passes an dieselben

Fälle der Ausländer.. über den obigen Zeitpunkt hinaus

in der dortigen Gemeinde bleiben will, ist er- bis dahin zur

Stellung eines Antrags auf Erteilung einer Aufenthaltserlaubnis

nach den vorgeschriebenen Vordruck zu veranlassen.

Im Auftrag

[Handwritten signature]

*Joseph Ringel...
1. 1941. Württemberg & Reichsgaue*

GOVERNMENT EXHIBIT J1T
CERTIFICATE OF TRANSLATION

Pursuant to 28 U.S.C. § 1746, I certify under the penalty of perjury that the attached document in English, Police dealing with Foreign Nationals 13 February 1945 is a true and accurate translation of the designated portions of the pages of the attached document in German, Ausländerpolizei to the best of my knowledge and belief.

Executed this 15th day
of September, 1982

/s/ Steven B. Rogers

The District Counselor Tubingen, 13 Feb. 1945
—Registration Office for Foreign Nationals—

To the Mayor
in *Poltringen*

Subject: Police dealing with Foreign Nationals
[Ausländerpolizei]

Enclosure: 1 passport

The foreign national *Josef Kung*, living there has received a residence permit without special conditions and restrictions and valid until 1 Feb 1947 Wurttemberg and Hohenzollern.

I request that the enclosed passport be delivered to the above named individual. [A hand-drawn line appears next to this line-trans.]

In case the foreign national wants to remain in that community beyond the above-mentioned time, he is to initiate the filing of an application for the issuing of a residence

For:
/signature/ [illegible]

[Stamp:] The conformity of the photocopy-
copy with the original is certified.
Ammerbuch, 18 Feb. 1982
/signature/ [illegible]

[Stamp] Municipality of Ammerbuch
Tubingen District
Community of Poltringen

PLAINTIFF'S EXHIBIT J3T

Municipality of Poltringen
The Mayor
To the *District Counselor*
in *Tubingen*

Poltringen, 1 Oct 1945
Tubingen District

Subject: Registration of Foreign Nationals.
Lithuanians

KUNGYS JOSEF, born 21 Sept 1915 in Taurage, with
wife SOFIE, [born] 3 Dec 1919

KUNGY BARBARA, born 20 Sept 1913 in Taurage

KUNGYTE FRANZISKA, born 18 Oct 1919. Medical Student.

ZIMANTAS STANISLAUS, born 19 Nov 1914
Poles

TWORZDYO JOSEF, born Aug 1919 in Kotowa-Wola.
Tarnow District.

KAZIMIEREK JOSEFA, [born] 21 Jan 1921 in Grobla,
Cracow District.

[illegible] HANNE, born 3 March 1926 in Havodnow;
Havodno, Stalin District.

MUSIAL ADELA, born 16 Sept 1916 in Hebdow, Tarnow District.

[0/0850 Karl Schumacher, Reutlingen]

[Stamp]: Certified True Copy
Ammerbuch, 18 Feb 1982
The Mayor's Office
[Signature]: illegible

[Stamp]: Municipality of Ammerbuch
Tubingen District
Community of Poltringen

Government Exhibit

N5T
120-69

Translation from the Lithuanian /11

Lithuanian Republic

Priests' Seminary of the Bishopric of Telsiai

Certificate of Matriculation

This Document certifies that JUOZAPAS KUNGYS, son of JUOZAPAS KUNGYS, born on 21 September 1915 in the village of Reistai, Silale District, Taurage County, was admitted to the Priests' Seminary of the Telsiai Bishopric on 21 June 1932 following completion of five years at the "Saulė" *Gymnasium* in Sveksna. JUOZAPAS KUNGYS completed the minor Priests' Seminar [*Kleine Priester-seminarium*] in Telsiai with very good discipline on 22 June 1935. (This is equivalent to 8 years of *gymnasium*; official announcements V.Z. No. 332; 2276, Paragraph 18). He received the following grades:

- | | | |
|-----------------------------|-----------|-----|
| 1. Theological Preparations | very good | (5) |
| 2. Liturgy | very good | (5) |

3. Church History	very good	(5)
4. History and Civics	very good	(5)
5. Philosophy		
a) Logic	very good	(5)
b) Criteriology	very good	(5)
c) Psychology	good	(4)
d) Cosmology	good	(4)
e) Ontology	very good	(5)
f) Theodicy	very good	(5)
6. Lithuanian Language	satisfactory	(3)
7. Latin	satisfactory	(3)
8. French Language	good	(4)
9. German Language	good	(4)
10. Greek Language	good	(4)
11. Mathematics		
a. Algebra	satisfactory	(3)

120-69

[CONTINUATION]

certificate.

(Photograph with Seal)

Telsiai, 23 June 1938/151.

Chancellor of the Seminary

Signed with signature

Dean

Signed with Signature

Professors of the Priests' Seminary

Signed with multiple signatures

Secretary

Signed with signature

The conceptual correctness of the German translation from the original is herewith attested to.

[SEAL]: [Text in Lithuanian s/ Illegible
and French] Committee of Administrator
Lithuanians in Wuerttemberg Lithuanian
National
Committee

No. 828

Tuebingen,

10 November 1945

It is herewith certified that this copy/photocopy is identical with the original

Tuebingen, 18 November 1982 [stamp]
The Central Administration

By Order:

s/ Illegible

[SEAL] University of Tuebingen

PLAINTIFF'S EXHIBIT N9T

120-69

/20

Application for Admission to
the University of Tuebingen
on [Stamped]: 22 November 1945
(to be filled out by University)

REGISTRY SHEET

[HWR]: KUNGYS Given Name: [HWR]: JOUZAS
(underscore call-name)

[HWR]: [HWR]:

Date of Birth: 21 September 1915 Place of Birth:
Sila District, County of
Taurage, Lithuania

Citizenship: [HWR]: Lithuanian

Name and Profession of Father: [HWR]: JUOZAS,
Farmer

Home address: [HWR]: Kaunas, Vilniaustrasse 21

Residence in Tuebingen: [HWR]: Poltringen Street No.
[HWR]: Hauptstrasse 12

High schools attended (give type, name, place, time for all higher schools attended):

[HWR]: "Saula" Gymnasium in Sveksna, 1 September 1927—22 June 1932

[HWR]: Telsiai Priests' Seminary, 22 June 1938

Matriculation examination accomplished after 8 years of school.

Date of matriculation certificate: [HWR]: 23 June 1938

Major field of study: [HWR]: Political Economy

Previously attended university-level schools:

from the beginning of—semester 19—to the end of the
—semester 19—University—

from the beginning of—semester 19—to the end of the
—semester 19—University—

from the beginning of—semester 19—to the end of the
—semester 19—University—

Now in the 1st university-level semester and the 1st semester in the major field of study (each without any vacation semesters)

University-level examinations accomplished (premedicinal, etc.): --

Activities after the matriculation examination during those semesters not spent at University-level schools (precise statement of dates, etc.): [HWR]: 22 June 1935 through 23 June 1938 I studied theology and philosophy in Telsiai (Lithuania).

[HWR]=Handwritten

120-69

[continuation]

[HWR]: *On 1 December 1938 I served in the Lithuanian army, where I was entrusted with various positions. 16 January 1941 I arrived in Kaunas, and was the senior book-keeper at the "Poligraph" Industrial Trust. Since 16 November 1942 I managed an industrial concern in the same city until my escape to Germany.*

I give my word of honor to have made these statements conscientiously and to the best of my knowledge.

Tubingen, 16 November 1945 Signature: s/ J. KUNGYS

This questionnaire is to be filled out and submitted with the prescribed academic documentation on application for admission.

It is herewith certified that this copy/photocopy is identical with the original. v.21

Tuebingen, 18 November 1982 [stamp]

The Central Administration

By Order:

s/ Illegible

[SEAL]: University of Tuebingen

[HWR]=Handwritten

PLAINTIFF'S EXHIBIT J5T

Municipality of Poltringen

Poltringen, 2 Feb 1946

The Mayor

To the District Counselor
in *Tubingen*

Subject: Information about Nationals of the Allied
Nations

List of the persons re: Item 1 who still
reside in the community.

1. Lithuanians

1. KUNGYS JOSEF, born 21 Sept 1915 in Taurage,
Student of political economics in Tubingen.

2. KUNGYS SOFI [sic], his wife, born 3 Dec 1919, Dentist here.

2. Poles

1. TWOZYLDLO JOSEF, born 9 Aug 1919 in Kotowa; stableman for the Miller Nolz.
2. KAZIMIEREK JOSEFA, born 1 Jan 1921 in Grobla; employed by Frau LUZIA FLEISCH as a farm helper.
3. MUSIAL ADELA, born 16 Aug 1916 in Hebdow, employed by BERNHARD SCHAIBLE as a farm helper.

[Signature]: illegible
The Mayor

[Stamp]: Certified True Copy
Ammerbuch, 18 Feb 1982

The Mayor's Office
[Signature]: illegible

[Stamp]: Municipality of Ammerbuch
Tubingen District
Community of Poltringen

PLAINTIFF'S EXHIBIT J8T

Municipality of Poltringen
The Mayor:

Poltringen, 2 March 1946

To the *District Counselor*
in *Tubingen*

Subject: Information About Nationals of the Allied
Nations

List of the Lithuanian nationals who still
reside in the community.

1. KUNGYS JOSEF, born 21 Sept 1915 in Taurage, Student of political economics in Tubingen.
2. KUNGYS SOFIE, born 3 Dec 1919, Dentist here. Wife of Item 1.

By Order Of
The Mayor
[Signature]: Vogelmann

[Stamp]: Certified True Copy
Ammerbuch, 18 Feb 1982
The Mayor's Office
[Signature]: illegible

[Stamp]: Municipality of Ammerbuch
Tubingen District
Community of Poltringen

PLAINTIFF'S EXHIBIT J7T

23 March 1946

To the District Counselor
in Tubingen

Registration of Foreign Nationals.

From 17 March 1946 To 24 March 1946

List of the Lithuanian nationals who still reside in the municipality of Poltringen.

1. KUNGIS JOSEF, born 21 Sept 1915 in Taurage. Student of Political Economics in Tubingen.
2. KUNGIS SOFIE, born 3 Dec 1919. Dentist here. Wife of Item 1.

List of the Polish nationals who still reside in the municipality of Poltringen.

- 1.) TWOZYDLO JOSEF, born 9 Aug 1919 in Kotowa. Stableman for the Miller Holz.
- 2.) KAZIMIERK JOSEFA, born 1 Jan 1921 in Grobla, works as a farm helper for Frau LUZIA FLEISCH.

Departure Notice.

MUSTIAL ADELA, born 16 Aug 1916 in Hebdow, has signed out for the week of 16 March 1946 to 23 March 1946 to stay at the Transit Camp at Boblingen.

[Stamp]: Certified True Copy
 Ammerbuch, 18 Feb 1982
 The Mayor's Office
 [Signature]: illegible

[Stamp]: Municipality of Ammerbuch
 Tübingen District
 Community of Poltringen

PLAINTIFF'S EXHIBIT J9T

22 May [194]6

To the *District Counselor*
 in Tübingen

Registration of Foreign Nationals

Registration of Foreign Nationals Until 20 May 1946

1. KUNGIS JOSEF, born 21 Sept 1915 in Taurage,
 Lithuania.
2. KUNGIS SOFIE, born 3 Dec 1919 in Taurage,
 Lithuania.
3. TWOZYDLO JOSEF, born 9 Aug 1919 in Kotowa,
 Poland.
4. KAZIMIERK JOSEFA, born 1 Jan 1921 in Grobla,
 Poland.

By Order Of
 The Mayor

[Stamp]: Certified True Copy
 Ammerbuch, 18 Feb 1982
 The Mayor's Office
 [Signature]: illegible

[Stamp]: Municipality of Ammerbuch
 Tübingen District
 Community of Poltringen

EXHIBIT 53-D

WAR DEPARTMENT SPECIAL STAFF
CIVIL AFFAIRS DIVISION

WASHINGTON 25, D.C.

WDSCA 383.7

4 March 1947

Rev. Dr. Joseph B. Koncius
United Lithuanian Relief Fund of America
19 West 44th Street
New York 18, N.Y.

Dear Reverend Koncius:

Reference is made to your letters addressed to this Division concerning the screening of Lithuanian displaced persons.

An intensive screening program was initiated in Mid-June 1946 to determine the eligibility for United Nations displaced persons care and treatment. In general, screening is designed to eliminate war criminals, collaborators, people who came to Germany of their own volition and people who have entered the United States Zone Germany illegally after 1 August 1945. UNRRA supplements this military screening by continuous checking and interrogation, to insure that only eligible persons enjoy displaced persons privileges.

Apparently, some lower UNRRA echelon proceeded on their own initiative to compile and elaborate questionnaires and to inaugurate a procedure of review using this questionnaire in conjunction with individual interrogation. Application of this procedure resulted in numerous complaints and petitions of protest, by displaced persons, in-

dicating agitation among them and resistance to this procedure.

This condition was brought to the attention of the UNRRA Zone Director who undertook to stop procedure pending his personal investigation. Current understanding with Zone Director UNRRA is that review of eligibility for UNRRA care will continue based upon United States Army screening records and other existing documents, and without use of a special UNRRA form or separate screening operation.

Sincerely yours,

/signed/ DANIEL NOCE
Major General, GSC
Chief, Civil Affairs Division

PLAINTIFF'S EXHIBIT A-14

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
RECORD OF SWORN STATEMENT

Office: *Newark, New Jersey* File No.: *C7 131 022*

Statement by: *Juozas Kungys*

In the case of: *Juozas Kungys*

At: *970 Broad Street, Newark, New Jersey*

Date: *December 3, 1975*

Before: *John J. Fitzsimmons, Jr., Criminal Investigator;*

Barbara Tavoraina-Clerk steno
(Name and Title)

In the *English* language. Interpreter *not* used.

I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer

oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding: allegations made about your activities in 1941. Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Q. Do you wish to have a lawyer or any other person present to advise you?

A. No—Yes my wife is present Sofija a naturalized United States Citizen.

Q. Are you willing to answer my questions at this time?

A. Yes.

Q. Do you swear that all the statements you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?

A. So help me God.

Q. What is your full and correct name?

A. Juozas Kungys.

Q. Do you use the name Joseph?

A. Some people use this name.

Q. Have you ever used any other names?

A. No just Anglo-version Joseph. When I first got a job in English it was Joseph so I signed Joseph.

Q. Have you ever used the first name Joseph?

A. No.

Q. Have you ever used any other names?

A. No.

Q. Have you ever used the names Juzas Kongis or Kungis?

A. No.

Q. When and where were you born?

A. October 4, 1913.

Q. What was the name of the place where you were born?

A. Kaunas, Lithuania.

Q. Did you live all of your life in Lithuania until you came to the United States?

A. Yes until we came to the United States.

Q. Did you ever live in any other city other than where you were born?

A. Yes, Telsiai, Kaunas, Kedainiai, for a short period I was in a lot of small towns, Siauliai.

Q. During what period of time did you live in Kadainiai?

A. 1939-1941 until June.

Q. Where were you living on August 28, 1941?

A. I was in Kaunas.

-2-

Q. You weren't in Kadainiai?

A. Not as far as I can remember.

Q. When did you leave Lithuania?

A. We left when the Russians invaded, when we saw the first Russian tanks, and when the Russians broke the fronts. I think it was October 4, 1944. My wife and I left in a horse and buggy.

Q. You left Lithuania and you went to Germany?

A. Yes, we went with others to get away.

Q. Your Immigration file reflects that you were in the Lithuanian Army?

A. Yes 1938-1939.

Q. Where were you stationed?

A. I was stationed in Kaunas in Lithuania. It was compulsory duty.

Q. Right before the war?

A. Yes it was peacetime. I studied for the priesthood and then I went out for one year for military training.

Q. What was your rank in the Army? What kind of work did you do?

A. The lowest, 2nd Lieutenant. It was like the reserves, National Guards.

Q. What branch of the Service were you in?

A. Only one branch, just the Army.

Q. The Immigration Visa you were issued to come to the United States reflects you lived in Kaunis from 1942-1944?

A. Yes.

Q. Then you went to Poltringen, Germany?

A. Yes, it is a small town.

Q. When you were in the Lithuanian Army did you have any duties connected with any camps or Lithuanian Police?

A. No, No, Never.

-3-

Q. One of the places that you stated you lived in was Kadainiai. That was where your wife was born?

A. Yes.

Q. Did you ever hear of a place called Kojdany?

A. No.

Q. The allegation was that on August 28, 1941 with the active aid of local Lithuanians, the list of names given,

they shot 710 men, 767 women and 559 children, it goes on to state that some of these people are in the United States at this present time. Did you ever know a man named Edward Snieska?

A. No I know a Snieska, not Edward. He was an old man.

Q. How about his mother Aleksandra Snieska and his brother Antonas Snieska a doctor in Philadelphia?

A. No.

Q. Did you ever know a person called Kostas Januska or Januska?

A. No I just hear the name. It is a common name.

Q. You were never anywhere in Lithuania when the Russians invaded. You told me that when the tanks came you fled. Did they ever shoot any of the local people?

A. Yes they slaughtered everybody that was in prison, the Russians when they were leaving Lithuania.

Q. The people that were left in Lithuania where the Germans occupied it right after June 24, 1941 were invaded by Russians?

A. Yes.

Q. Nazi's with the help of the Lithuanians shot these people?

A. No never were anything like this, no I never seen it, as a matter of fact everybody was waiting. That was going on when Lithuania was 10 months under Russian occupation. More gruesome days there never was in the world.

(Investigator shows respondent picture of Edward Snieska and respondent stated he could not identify the picture)

-4-

A. (continued)

I know everybody was waiting for medical aid and the jails were filthy. Myself I was hiding in the woods. The Russians were capturing everybody. All Lithuanians were praying, looking at the heavens for help. Finally the Germans came in. Each railroad station was loaded with Lithuanians. In two weeks they deported 140,000 people to Siberia. My father, my younger sister and my 10 year old brother were sent for 10 years to Mongolia in concentration camps. Then there was a resistance movement and Krushchev came in. They let many go. My father died one year after he returned. In that time about 4,000 Lithuanians died. When the Russians were leaving they slaughtered thousands of people. They were slaughtering people all the way back to Russia.

Q. Are there any people here in the United States who knew you in 1941 that knows you were in Kaunas at that time?

A. Yes, if need be I can scrape them up.

Q. Is Mr. Mecys Anuskevicius living in Brooklyn?

A. He past away.

Q. When did he die?

A. 1962.

Q. Was he related to your wife?

A. My wife's brother, my brother-in-law.

Q. Your mother and father are both deceased?

A. Yes.

Q. Stanley and Apolonia Szwonicki they furnished affidavits?

A. My wife's uncle, he is deceased.

Q. Sophie Grabowski?

A. She is living. She is about 80 years old. She is a frail, elderly lady. Now she does not live at 616 New Jersey Avenue, Lyndhurst.

-5-

Q. She was never in Lithuania, in her affidavit of support she indicated she was a citizen, maybe she was born in Lithuania?

A. I don't know I always thought she was a citizen.

Q. If you can think of anyone that knew you in 1941 in Lithuania will you let me know the name and address just to substantiate what you said?

A. Yes I understand.

Q. To respondents wife: You were with your husband in 1941?

A. No we got married in 1943.

Q. First marriage for both of you?

A. Yes at that time I did not intend to get married yet.

Q. All during the time you were in the Lithuanian Army you never had any duties guarding prisoners?

A. No.

Q. When you became a naturalized citizen your witnesses were Adele E. Laukzemis?

A. Yes she is deceased.

Q. And Joseph Krukauskas of 201 New York Avenue, club manager. Club manager of what?

A. Lithuania St. Georges.

Q. Have you understood all of the questions I have asked? Is there anything you would like to add?

A. I have said what I have said, there is a lot of jealousy. One woman came after 32 years, the Russians finally let her out. Jealousy and drunkenness. My wife's sister a few years ago she visited us here and she told us terrible stories. We tried to help by sending packages but people were jealous.

Q. Is it all right with you if when the girl types this up I come up to your house and you sign this for me?

A. Yes.

-6-

Q. I don't think I will have any reason to see you anymore?

A. If you want to talk to my pastor. He knows what kind of man I am. I have nothing to hide. I tried to get somebody that knew me. I have nothing to hide.

Q. Whoever made this allegation said it happened in a place called Kojdany, Lithuania, but it is not on the map, it must be a mistake. I appreciate your coming.

A. It is my duty. I try to be a good citizen.

Q. Would you sign the stenographers notes to acknowledge your presence here today?

A. (Complies)

I certify the foregoing to be a true and correct transcript of my stenographic notes taken in this case at Newark, New Jersey on December 4, 1975.

/s/ Barbara Tavormina
USINS, Steno

-7-

PLAINTIFF'S
EXHIBIT A-15 A

Good morning, Mr. Kungys. My name is Joseph Lynch. I am an attorney with the Department of Justice and my colleague, Jovi Tenev, is also an attorney with the Department of Justice, and you are here in response to our letter of March 12, 1981 and you have appeared here in the Immigration and Naturalization Service at 970 Broad Street, Newark, New Jersey and it is approximately 10:40 a.m. on March 27, 1981.

As I would restate in my letter, it has come to our attention that you might have been less than candid in some of the applications you made to come to this country and to be a citizen. I would advise you as I had in the letter that you would be entitled to have an attorney here if you wanted, that you have the right to remain silent if you like, that anything you might say might be used against you-if there is a future proceeding. I also in my

letter offered an interpreter but I understand you don't need an interpreter.

Kungys: I don't think so.

Lynch: Alright. Would you be willing to answer some questions about your immigration process?

Kungys: Yes. Yes.

Lynch: Alright. Would you raise your right hand sir? Do you swear that the answers you give this morning will be the truth, the whole truth, and nothing but the truth, so help you God?

Kungys: So help me God.

Lynch: Okay. Mr. Kungys this is recorded now, so just talk in your normal speech and it will be picked up. Would you state your name, sir?

Kungys: First name. Juozas, Joseph.

Lynch: And your last name?

Kungys: Kungys.

Lynch: And where do you live sir?

Kungys: 778 Grove Street, Clifton

Lynch: Is that in the State of New Jersey?

Kungys: Yes.

Lynch: And how old are you?

Kungys: I am almost 67.

Lynch: Where were you born? What was the date of your birth?

Kungys: 1913, October 4.

Lynch: October 4. And where were you born?

Kungys: Kaunas in Lithuania

Lynch: Lithuania. And what were your parents' names?

Kungys: Kungys.

Lynch: And your father's first name?

-2-

Kungys: Joseph.

Lynch: And your mother's first name?

Kungys: Anna.

Lynch: Anna. Do you remember her maiden name?

Kungys: Jurgelaite.

Lynch: Jureluite. And did you have brothers and sisters?

Kungys: Yes.

Lynch: Are they still alive?

Kungys: They are alive. Some are dead.

Lynch: How many brothers did you have?

Kungys: I have three now.

Lynch: And how many did you ever have?

Kungys: Four.

Lynch: And how many sisters did you ever have?

Kungys: Five.

Lynch: And are they all alive?

Kungys: Yes.

Lynch: And some of them live in this country and some of them live overseas?

Kungys: Some of them live over in Lithuania.

Lynch: And you received your education in Lithuania?

Kungys: Lithuania, yes.

Lynch: Do you recall what is the extent of your education?

Kungys: Well, I finished . . . I went to Priest Seminary, you know. I finished gymnazium, high school and Priest Seminary.

Lynch: What years did you go to high school?

Kungys: What years?

Lynch: Yes. Do you recall?

Kungys: 1920, 1930, something like that.

Lynch: Where did you go to school?

Kungys: Svekesna.

Lynch: Is that a high school?

Kungys: Yes, high school.

Tenev: Would you spell it?

Kungys: S-v-e-k-e-s-n-a.

Lynch: And that's the name of a place that you went to high school?

Kungys: Yes.

Lynch: Did you go to any other high school?

Kungys: I went into Priest Seminary. I finished over there.

Lynch: Where was that Seminary?

Kungys: Telsiai. Telsiai.

Lynch: Telsiai. And what years did you go to Seminary?

Kungys: After 1938.

Lynch: How long were you there approximately?

Kungys: Six years.

Lynch: Six years. And what happened in 1938?

Kungys: I go out and then there was conscript, you know.

Lynch: Conscription?

Kungys: Conscription to the army, you now. Because in our country anybody who reached 21 years of age had to . . . was compulsive he took it.

Lynch: I see.

Kungys: And there was draft like, say, in this country.

Lynch: How long were you in the army?

Kungys: A year and a half.

Lynch: And that was the Army as opposed to the Navy or the Marine Corps. It was the Army?

Kungys: It was Army. It was like the reserve, reserve corps. Training for the reserve, you understand.

Lynch: And did you attain any rank? Were you an officer or an enlisted man or?

Kungys: I was like a reserve junior officer. The first lowest grade, you understand.

Kungys: It was prepared for in case something happened, you know.

Lynch: I see.

Kungys: But not for regular duty.

Lynch: When the Germans invaded Russia were you in the Army?

Kungys: No. No.

Lynch: I see.

Lynch: Where were you living then?

Kungys: I was living in Kedainiai.

Lynch: And that's in Lithuania?

Kungys: Lithuania, yes.

Lynch: And what was your occupation at that time?

Kungys: I was working in a bank.

Lynch: Oh, I see. What were you doing in the bank?

Kungys: Accounting.

Lynch: Accounting?

Kungys: Accounting, yeah.

Lynch: And how long were you working in the bank?

Kungys: How long I work? Until the Russians came. Then I quit.

Lynch: Until the Russians came in?

Kungys: They came in then I worked, you know. Then I quit.

Lynch: When the Germans came in to Russia you were at the bank?

Kungys: Yes. Yes. Yes.

Lynch: I see.

Lynch: And how long did you remain in Kedainiai?

Kungys: Up to the, up to the war.

Lynch: When the Russians came, when the Germans came in?

Kungys: When the Germans came in then you know. I joined this. I went over there. I moved to Kaunas.

Lynch: Can you translate this paper for me?

Kungys: Yes. I had this paper I gave it to Mr. Fitzsimmons.

Lynch: That is the investigator who interviewed you two years ago?

Kungys: Yes. Yes. And I had, I don't know what, whether he give this or not. See this is July 6, 1941. It's being advised that from this day on Joseph Kungys start working as a bookkeeper in our company.

Lynch: I see.

Kungys: There was printing outfit.

Lynch: Pardon me.

Kungys: There was printing outfit.

Lynch: A printing company?

Kungys: A printing company.

Lynch: And where was this printing company?

Kungys: In Kaunas.

-5-

Lynch: In Kaunas?

Kungys: Kaunas, yeah.

Lynch: You say that you started to work there on July 6th, '41.

Kungys: Yes. Yes.

Lynch: And had you just left the bank to take this job?

Kungys: Yes.

Lynch: What was the name of the bank that you worked at?

Kungys: It was all bank we had, Lithuanian bank.

Lynch: There was only one bank in town?

Kungys: Yes that's all.

Lynch: And you said you were an accountant there?

Kungys: Yes. Not a real accountant in real name; just bookkeeper, like.

Lynch: A teller? Did you handle the money?

Kungys: No. No. No. No money. Just . . . its different were then different procedures today.

Lynch: I see. You work with figures, with numbers?

Kungys: Yes with numbers and take it where the people come in to pay, whatever, real estate taxes, things where people come in and then gives those things, you know.

Lynch: Did you move to Kaunas when you changed your job to this printing company?

Kungys: Yes.

Lynch: Where did you live in Kedainiai?

Kungys: In Kedainiai?

Lynch: Yes, Kedainiai.

Kungys: What do you mean?

Lynch: Did you have your own house?

Kungys: No. No. No. I couldn't afford it. I had small room, that's all.

Lynch: Did you live with your parents?

Kungys: No. My parents, no. No.

Lynch: Did you live in a rooming house?

Kungys: Not rooming house. I lived with some people they had about say two people, two boarders.

Lynch: I see. Do you remember their names?

-6-

Kungys: One name is I can't reveal—is still living over there.

Lynch: Okay. How about the ather one?

Kungys: That's all. That's all had: one, me and him.

Lynch: You and him lived in this house?

Kungys: Yes in this house but that fellow is still over there.

Lynch: I see.

Kungys: And I am afraid you know, in case leaks out.

Lynch: Okay.

Kungys: . . . if he now lives.

Lynch: Who owned the house? Do you know?

Kungys: Who owned the house the people are dead now.

Lynch: I see. Do you remember their name?

Kungys: The people are dead and the house is nationalized.

Lynch: Do you remember the names of the people who owned the house.

Kungys: Anuska.

Tenev: How do you spell it?

Tenev: A-n-u-s-k-a?

Kungys: Yeah.

Lynch: Were you married at this time?

Kungys: No.

Lynch: When did you get married sir?

Kungys: 1943.

Lynch: And that is the lady to whom you are still married?

Kungys: Yes.

Lynch: And where did you marry her?

Kungys: Kaunas.

Lynch: Kaunas, Lithuania?

Kungys: Kaunas, Lithuania.

Lynch: And I understand she is a dentist.

Kungys: Yes.

Lynch: And what did she go to school in Lithuania?

Kungys: Yeah. She been to school there and she finished already in NYU. Yeah, she had to finish because, you know, they wouldn't recognize. She had to re-qualify, like.

-7-

Lynch: She to requalify as a dentist in this country? In NYU?

Kungys: Yes. For three years.

Lynch: I see.

Kungys: And I took hardest job I could get to help support her while going to school.

Lynch: And where was your wife from:

Kungys: From Kendainiai.

Lynch: I see. And were her parents there?

Kungys: Yes.

Lynch: And did you know her in Kedainiai?

Kungys: Yes. I knew her.

Lynch: Is that where you met her?

Kungys: Yes. The first I met her. But it was not less than friendship or anything. And after I moved, I moved to Kaunas, you know, then I get married.

Lynch: And you met her again?

Kungys: Yes. Met her again, you know, and then we started going together and decided to get married.

Lynch: I see. What did you do in Kaunas for a living at the printing company?

Kungys: I was bookkeeper.

Lynch: And how long did you stay with the printing company?

Kungys: I stayed for about a year.

Lynch: A year?

Kungys: About year or two maybe. I don't know. And then I join another company, you know, it was more money. Because during the war, you know, it was very, very, very tough with ration cards and then I join another company.

Lynch: What kind of a company was this?

Kungys: It was a brush manufacturing company.

Lynch: What was the name of it, do you remember?

Kungys: What was the name . . . What was the name. Just brush manufacturing.

Lynch: What was the name of it?

Kungys: Yes.

Lynch: And did they manufacture brushes?

Kungys: Brush and brooms, what you call it.

Lynch: Brooms.

-8-

Kungys: Brooms and brushes.

Lynch: And was their office in Kedainiai?

Kungys: No.

Lynch: Excuse me. In Kaunas?

Kungys: Yeah. Small factory.

Lynch: An did they have a factory there?

Kungys: Small factory. I wouldn't call a factory in the American sense. It was just, you know, small shop.

Lynch: I see.

Kungys: They made brooms and things like that.

Lynch: You did bookkeeping for that company?

Kungys: I did bookkeeping and I did like administrating work. Because it was privately owned and the fellow who in the . . . he had another job and I was doing daily chores, you know, administrating when he was absent.

Lynch: How long did you work there, sir?

Kungys: Until I had to leave when the Russians came in.

Lynch: Oh. You worked that place until?

Kungys: Until 1941 . . . 1944.

Lynch: '44.

Kungys: '44, yeah, I think, 1945, no. '44, when the Russians came.

Lynch: And at that time . . . you were married at that time?

Kungys: Yes.

Lynch: I see.

Kungys: And there was no train and the city was surrounded already and was no trains anymore go and I grab last boat Germans were, you know, pulling away.

Lynch: Right.

Kungys: So I grabbed the one they would let us go on on the boat, I left everything and I went.

Lynch: You took a boat into Germany?

Kungys: Not a boat but what you call tugboat, like tugboat.

Lynch: Tugboat?

Kungys: Yes. It moves slow

Tenev: Where did it go? From where?

Kungys: It was in Lithuania. And I went closer to watch Lithuanian-German border.

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Kungys: I don't know; I don't remember now. But, see now, they were required by consulate and all papers had to be in original.

Tenev: I see.

Kungys: They insisted on it.

Lynch: When you worked for this broom company where did you live in Kaunas? Do you recall?

Kungys: I lived in Kaunas, Zukauskas.

Lynch: Is that an address.

Kungys: Yes, number eight.

Lynch: Number eight?

Kungys: I still remember it was . . .

Tenev: Could you spell this? Here maybe it's easier for you to write it down.

Kungys: No. Z-u-k-a-u-s-k-a-s.

Lynch: Street?

Kungys: Yes. Street.

Tenev: And this was in Kaunas, right?

Kungys: That was in Kaunas.

Tenev: Where did you live in Kedainiai? Do you remember?

Kungys: In Kedainiai I lived in Radvilu. Radvilu.

Tenev: Will you write that down? . . . Radvilu?

Kungys: Yeah.

Lynch: Is that a street?

Kungys: Street, yeah.

Tenev: Do you remember the number?

Kungys: No, I don't remember that number. It's changed over there now everything.

Tenev: No, I was just wondering because you remembered the number in Kaunas.

Kungys: Yes but it is no more. That's Zukauskasas. There was Genedal Zukauskasas fought for Lithuanian independence in 1918; that is strictly against Russians. Now they changed all these things. They even change cities. It was Marijampole city, say for instance, Maria?

Tenev: Marijampole:

Kungys: Marijampole devoted to Virgin Mary. Now they change this because they couldn't stand it. The first communist, Lithuanian communist was 1918 and all the people call still Marijampole, but on paper they can't stand it, has to be eradicated.

-16-

Lynch: I see. Now on January 9, 1947 you made application for an immigration visa to the United States. We let me show you Mr. Kungys. (Do you have the originals there).

Tenev: Yes, I've the originals.

Lynch: Is this you Application for Immigration Visa? Is that your signature on the bottom?

Kungys: Well, could be. I guess so. If I applied, must be mine.

Tenev: Is that your signature, right there not the bottom of the page?

Kungys: It could be. Times change. Yes it looks like it.

Lynch: Would you turn over on the back here, that photograph is that you?

Kungys: Yes. Sure it's me. Yeah.

Lynch: Did you present that photograph to the consul when you were applying for your visa?

Kungys: Yes, sure.

Lynch: Do you recall when you had that photograph taken.

Kungys: About at that time, in Germany.

Lynch: I see.

Kungys: I don't remember when. I mean I have to go to the printing, you know, where the photo, you know.

Lynch: Photographer?

Kungys: Yes. Make photographs.

Lynch: Okay.

Tenev: And that was in Germany?

Kungys: Ah.

Tenev: In Germany?

Kungys: Yes.

Lynch: Here's another application. It's called the Alien Registration Foreign Service Form. Is that your signature on that form?

Kungys: Imagine so, It is.

Lynch: And is this an Application for Certificate of Arrival and Preliminary Form for Declaration of Intention. Do you recognize your . . .

Tenev: On page 2 and page 3 . . .

Lynch: On page 2 and 3?

Tenev: Your signature.

Lynch: Is your signature on the bottom of those?

-17-

Kungys: Yes. I imagine so.

Lynch: And I show you a document called Application to File Petition for Naturalization. On the back of that document, that's a four page document. Is that your signature on the back?

Kungys: I imagine so. Yes.

Lynch: When did you apply for naturalization sir? Was that . . .

Kungys: Well I can't remember now. I would have to go to the papers.

Lynch: Well I think I might indicate . . .

Kungys: I don't have a diary you know.

Lynch: On October 23, 1953 is that when you made application?

Kungys: Well, I guess so. I wouldn't deny it but I don't have a diary.

Lynch: Did your wife make application at the same time to become a citizen?

Kungys: Yes. Maybe a day or so later, maybe. I don't know.

Lynch: I show you a document called a Petition for Naturalization. Is that your signature on the bottom of it?

Kungys: Yes.

Lynch: On the back of that Application there is some other signatures. Your witnesses. Do you remember them?

Lynch: Adele.

Kungys: God bless her soul she's dead.

Lynch: . . . what her's last name?

Kungys: Lankzemis.

Lynch: And the other witness Joseph.

Kungys: I can read. Kaukauskas. They know me over there, you know not over there.

Lynch: And I show you a document called Certificate of Naturalization. Is that your photograph on it?

Kungys: Yes. Yes.

Lynch: And is that your signature on it.

Kungys: Yes. I guess so. Sure. Must be otherwise I wouldn't got it.

Lynch: Now it has come to our attention that the address that you provided, not the address but the date of birth that you provided and the . . . excuse me. Do you recalled you were interviewed by Investigator John Fitzsimmons on December 3, 1975 right in this building?

Kungys: Yes. I was.

Lynch: And he . . .

Kungys: I was couple of times with Mr. Fitzsimmons.

Lynch: I see. And there came a time after you were interviewed by Mr. Fitzsimmons, he reduced the interview to a written Q&A they call it, questions and answers. Do you recall that and do you recall you were asked to sign it? On December 4, 1975?

Kungys: Yes, I was asked to sign something.

Lynch: And is that your signature, sir?

Kungys: Yes sir.

Lynch: That is on the last page of a document called Record of Sworn Statement.

Kungys: Yes.

Lynch: As I was saying before. There is some reason to believe either a mistake or a concealment or a misrepresentation had been made concerning your date of birth and your place of birth.

Kungys: Yeah.

Lynch: I would like to show you some documents and see if we can clear it up.

Tenev: Mr. Kungys you said that you were in the army from '38 to '39. Is that correct?

Kungys: Yes. I was in, I think, in spring.

Tenev: At that time you filled out some forms to join the army. Is that right?

Kungys: I filled out forms, not to join the army; but I was in draft, yes.

Tenev: But in joining the army you filled out some forms. —

Kungys: Yeah.

Tenev: And you stated also that you were in the seminary. —

Kungys: Yeah.

Tenev: Is that right?

Kungys: Yes.

Tenev: Let me show you this document here. Is that your picture on that document there. The document is entitled "Petition" and it's in the Lithuanian language. Is that your signature there, sir?

Kungys: I don't know now. So many years you know.

Tenev: Well—did you fill this document out when you were applying for . . . when you were joining the army sometime in 1938. The document is dated Telsiai 1938.

-19-

Kungys: Yes. I guess so.

Tenev: You did fill that out?

Kungys: Yes.

Tenev: That is in your handwriting, then, right? Take your time and look at it carefully. Well, that's your photograph in the cassock isn't it?

Kungys: I could't even recognize now. It's so many years ago. 40, 40 some years, already you know.

Lynch: Did you have your picture taken when you were in the seminary probably?

Kungys: I guess so. Yes. I imagine so.

Lynch: And this photograph on the document looks like it's of a person in a clerical garb, there's a collar showing in the middle.

Kungys: Yeah, yeah, yeah.

Lynch: Would that be similar to the garb you wore in the seminary.

Kungys: It could be.

Lynch: Does that look like you or can you state?

Kungys: You know it could look like and it couldn't. I couldn't say exactly so many years.

Lynch: Have you read the information.

Kungys: Where?

Lynch: Read the document. It it about you?

Tenev: I believe it says that you want to become a military reserve officer.

Kungys: Yes, that's what it says, yeah.

Lynch: And is the document about you?

Kungys: I guess so.

Tenev: And that is your signature there?

Kungys: Yes.

Tenev: That document refers to the fact that you are submitting a picture. Is that the picture you submitted? The one on top there.

Kungys: Well, I can't say, yes. I can't say no now. 40 years you know. Sounds absurd. See, when I came in I looked at you and I have one, one fellow. It looks exactly just like you.

Tenev: What do you mean you have one fellow?

Kungys: When I came in. Yeah.

-20-

Tenev: Now.

Kungys: Now, no. I say it happens, you know, sometimes . . . you know.

Tenev: Let me show you another document. This is a document also in the Lithuanian language. Do you see your signature down there on the bottom? It's also dated. Telsiai.

Kungys: Yeah.

Tenev: Is that your signature?

Kungys: I guess so.

Tenev: Okay.

Kungys: It looks like . . . I can't say yes. I can't say no. Okay. Because so many years, 40 years, you know, are changing.

Tenev: Is that your handwriting? Does that look like your handwriting?

Kungys: Now I write different. I have different handwriting now.

Lynch: What is that document about. What is it called on the top?

Tenev: Curriculum Vitae.

Kungys: Curriculum Vitae, yeah.

Lynch: And is that about you? Just glance at it and see if the facts in there concern you.

Kungys: Some yes, some no.

Tenev: Well.

Lynch: What concerns you? Where is it about you?

Tenev: Did you go to the Sveksna high school? That is true isn't it.

Kungys: That's about all.

Tenev: Did you go to Silales high school at any time?

Kungys: No.

Tenev: You never did?

Kungys: No.

Tenev: Did you ever go to school in Pajurio?

Kungys: Pajurio, no.

Tenev: You never went to school there?

Kungys: No.

Lynch: What else does the document refer to? Did you enter the priest seminary in Telsiai city in September of 1932? Did you take an examination to go into the seminary?

-21-

Kungys: Yeah, you had to.

Lynch: And did you study philosophy and three years of theology there?

Kungys: Yes. I was six years over there.

Lynch: And after awhile you decided to leave the seminary.

Kungys: Yes

Lynch: And did you make application to become a Lithuanian army reserve lieutenant?

Kungys: Not that I decided, I told you, but it was compulsory.

Lynch: I see. This curriculum vitae is dated June 3, 1938 in Telsiu, Lithuania. Is that about the time you went into the army?

Kungys: It's about. Yes.

Tenev: That's the same date as the document that you identified before this one.

Lynch: The June 3, 1938? And did you enter the army in Telsiai?

Kungys: Yes Telsiai.

Lynch: And the signature on the document, is that your signature, sir?

Kungys: As I said it, you know, it is very hard. My signature changed a lot. Now of course my handwriting and everything.

Lynch: As you grow older . . .

Kungys: As you grow older everything changes. Habits, character, and things like that, you know. It's very, very hard. And I don't have any letters or any

from my previous years. Of course everything I left over there.

Lynch: This curriculum vitae indicates that you were born in 1915, on September 21 in Reistriu Village, Silales county in the Taurages region.

Kungys: Taurages.

Lynch: . . . near the Zemaityos border.

Tenev: How do you pronounce that?

Kungys: Zemaityes.

Lynch: . . . and indicates that you spent your happiest days of your childhood there. Where you born on September 21, 1915?

Kungys: '13.

Lynch: Pardon me?

-22-

Kungys: 1913.

Lynch: And were you born in Reistru village?

Kungys: I was born in Kaunas.

Lynch: What?

Kungys: Kaunas.

Lynch: Well, this document says that you were born on September 21, 1915 and that you were born in Reistru Village in Silalas county.

Kungys: Well, you know, we have no means to get to our papers or anything over there. Because Lithuania

is occupied by Russians. They can do anything they want to.

Lynch: Mr. Kungys this document appears to be in your handwriting and . . .

Kungys: It just appears.

Lynch: Yes, it appears, yes, sir, and the first sentence of the curriculum vitae says I was born in 1915 September 21 the far Zemaityds border.

Kungys: The paper could be fabricated, sir.

Kungys: Of course with the Russians they have all kind of means. They have means. I will have to bring to your attention that now we have one fellow just escaped to Finland. They do everything and that fellow will be able to tell you. They have government printing, government writing, government everything. They can do anything they want.

Lynch: Well, it escapes me why they would forge your date of birth and place you were born.

Kungys: I don't know why.

Lynch: Why would that be important to the Russians to forge such a thing?

Kungys: I don't know.

Lynch: You don't know.

Kungys: I don't know.

Lynch: Do you have some other documents, Mr. Tenev?

Tenev: This document which appears to be in the Lithuanian language. It is a, it is called Temporary Personal Identification No. 11840. This is an identity document in the Lithuanian language. I believe it is issued by the Burgomeister of Kaunas City. Is that correct?

Kungys: Yes. Kaunas Burmeister.

Tenev: All right. That document relates to you, does it not?

Kungys: Looks like.

-23-

Lynch: Is that your photograph on the document?

Kungys: Yes, it looks like mine.

Lynch: And when was that document dated? Is there a date on the document?

Tenev: April 26, 1944.

Kungys: April 26, 1944.

Lynch: Did you apply to the Burgermeister in Kaunas for a new certificate, a new identification?

Kungys: I can't remember that far.

Lynch: Did you lose your papers, perhaps, when you moved from Kedainiai to Kaunas and that you had to apply for a new identification paper?

Kungys: I can't remember that far.

Lynch: You can't remember?

Kungys: I can't remember.

Tenev: Does that have your correct date and place of birth on it, sir?

Kungys: As I said I was born 1913.

Tenev: No. Would you look at the document. Does that have your date and place of birth?

Kungys: Yeah. 1913.

Tenev: 1913? October 4?

Kungys: Yeah.

Tenev: in Kaunas?

Kungys: October 4.

Lynch: And did you supply that information to the Burgomeister in Kaunas?

Kungys: They must have had it if I applied. I can't remember.

Tenev: No, no. Did you show this document to the American Immigration authorities, to the vice consul?

Kungys: I can't remember.

Tenev: You can't remember.

Kungys: . . . which one I gave. As I said they asked for original papers; that's what I had and I gave them.

Tenev: Alright. So when you applied for a visa you showed this document to the consul?

Kungys: I presume so.

Lynch: What does it indicate? Why was the reason he applied for it, Jovi? Do you have that translation?

Tenev: Yes. Down at the bottom here it says . . .

Kungys: I can't remember 40 years ago.

Lynch: Well, maybe we will attempt to refresh your recollection as to why you applied for this document. What does the reason for the application?

Tenev: It says, "This certificate is issued on the grounds of instead of old passport No. 34865 which was issued by the Burgermeister of Kaunas City on the 3rd of January 1939." And it's signed and sealed by the Secretary of the Burgomeister of Kaunas City. And it has your photograph on it, right?

Kungys: I guess so.

Lynch: Well did you make application for that, sir, because you lost your other papers?

Kungys: I can't remember so well. Over 40 years ago. Now, as I said, now couple of months ago I had stroke, you know. My memory is not as sharp as it used to be.

Lynch: Okay. Well, we will attempt to refresh your recollection if we can.

Kungys: Well, it's alright.

Tenev: At the time that you applied for this document, did you go to the Burgomeister in Kaunas to have this delivered to you.

Kungys: Well, I guess so, because you can't get it (inaudible).

Tenev: And at that time you provided him with the photograph that was attached to it, or did they take your photograph there when you applied for it in 1944?

Kungys: I can't remember those things now. I'll tell you. I don't know the details.

Lynch: Do you have some more documents, Mr. Tenev?

Tenev: This is a document, again in the Lithuanian language, entitled Candidate and Student Information. Would you look at that, please? Is that your signature on the bottom?

Kungys: I can't say yes; I can't say no. It's been so many years.

Tenev: Mr. Kungys would you read that document and just tell me, on the first line it says, Juozas Kungys, son of Juozo. Is that information correct about you sir?

Kungys: Yes.

Tenev: Yes. Alright. The second line says, again let me just refresh your memory, this document is dated the 3rd of June 1938 in Telsiai. Now, at that time, is it true that your permanent residence was in the Taurages region in Reistriu village?

Kungys: No.

-25-

Tenev: No. Alright is it true that at that time your temporary residence was in Telsiu city at the Priest's Seminary?

Kungys: Yes, I was at Priest Seminary.

Tenev: You were.

Kungys: Yes.

Tenev: And is it true you were studying there at the time. Is that right? —

Kungys: Yes it was six years.

Tenev: And is it true your nationality, as indicated in No. 5, is Lithuanian?

Kungys: Yes, Lithuanian.

Tenev: And your religion is Roman Catholic?

Kungys: Yes, Roman Catholic.

Tenev: And is it true that you completed, during 1927 or 1929, Silales high school.

Kungys: No.

Tenev: That is not true.

Tenev: Is it true that you completed five years of Sveksna high school from 1932 to 1938?

Kungys: Yes. Yeah I was in Sveksna. Five years. Five years.

Tenev: Five years.

Kungy: Yeah.

Tenev: And then you went to Telsiai Seminary?

Kungys: Telsiu Seminary, yeah.

Tenev: There is some information there about your family. Your parents.

Kungys: Right.

Tenev: Is it true, your mother's name, you said, is Ona?

Kungys: Yeah.

Tenev: You have a brother, Antanas?

Kungys: Yeah.

Tenev: And Zigmas?

Kungys: Yeah.

Tenev: Stasys?

Kungys: Yeah.

Tenev: Yes. Felixas?

Kungys: Uh-hm.

Tenev: You have a sister, Ona?

-26-

Kungys: Yeah.

Tenev: Or you did. A sister, Barbara?

Kungys: Yeah.

Tenev: A . . what is that name, Domicelle?

Kungys: Yeah, Domicelle.

Tenev: Is that your sister, as well?

Kungys: Sister.

Tenev: Prane?

Kungys: Yeah.

Tenev: Elena?

Kungys: Yeah.

Tenev: And is it true that your father owned some property in Reistru village?

Kungys: Yes.

Tenev: He had a farm there?

Kungys: Yes.

Tenev: Do you recall the size of the farm, sir?

Kungys: No.

Tenev: How many hectares would you say, approximately?

Kungys: Thirty (inaudible). Something like that.

Tenev: Thirty. Maybe more.

Kungys: Yes, probably more. It was not a big farm.

Tenev: Okay.

Kungys: They took away everything.

Tenev: Now, again. This document says that you were born on September 21, 1915. Is that correct, sir?

Kungys: 1913.

Tenev: You were born in September 21?

Kungys: No, 1913. That's what I write.

Lynch: So the date of your birth as indicated on that document is not correct?

Kungys: I guess not.

Tenev: Mr. Kungys, you said that the Russians came in in 1939 to Lithuania.

Kungys: Not '39.

Tenev: Oh. I'm sorry. 1940.

Kungys: Yes I guess, 1940.

-27-

Tenev: Did your family . . . what happened to you at that time? You said you had been working at the bank in Kedainiai up until that time.

Kungys: Yes.

Tenev: And then when the Russians came you lost your job in Kedainiai at the bank?

Kungys: No I didn't lose it, exactly. But I quit.

Tenev: You quit.

Kungys: I quit.

Lynch: During the time that the Russians were occupying Lithuania in 1940, weren't you working at the bank?

Kungys: Yes, I was working at the bank.

Lynch: You worked throughout the occupation . . .

Kungys: Yes.

Lynch: . . . by the Russians.

Kungys: And then I went on vacation, you know?

Lynch: How long?

Kungys: Oh. It was about two weeks. When I came back I found, you know, the war broke out.

Lynch: That was the war between when Germany invaded Lithuania.

Kungys: Germany invaded Lithuania. And I was working against Russian in underground, too (inaudible).

Lynch: Do you recall in your Visa Application sir, you were asked where you had resided in Lithuania and you indicated that from 1933 to 1938 you resided in Telsiai, Lithuania and from 1938 to 1940 you resided in Kaunas, Lithuania and from 1940 to 1942 you resided in Telsiai, Lithuania, and from 1942 to 1944 in Kaunas, Lithuanian and from October 1944 to July 1945 in Holtergrin, Germany. Do you recall that, sir?

Kungys: No. I don't recall that much.

Lynch: You don't recall that?

Kungys: Excuse I'm taking my tablet.

Lynch: Certainly. Do you want some water or some coffee, Mr. Kungys?

Kungys: No. No. Just water.

Lynch: Do you want a smoke? Do you smoke?

Kungys: No, I don't smoke. I can't. Just a little bit of water.

Tenev: A little bit of water? Let me see if I can get you a cup of water.

Lynch: Well, I show you the application sir, and . . .

—28—

Kungys: I am very weak now. I tired.

Lynch: Okay, did you want to rest for a while.

Kungys: I don't know. Maybe, God, God will give me rest.

Lynch: Okay, sir. In your interview with Mr. Fitzsimmons.

Kungys: Thank you very much.

Tenev: Here you are. Have a glass of water.

Kungys: Yes. Thank you. Thank you.

Tenev: You've welcome.

Lynch: In your interview with Mr. Fitzsimmons you stated that you did live in Kedainiai from 1939 to 1941. Is that correct? That has been your testimony.

Kungys: Well, until the Russians came, you know. (Inaudible.) I don't know how to put it.

Lynch: Well the Russians came in 1940 and they stayed approximately a year.

Kungys: Yeah. Something like that.

Lynch: And in June of '41 the Germans came.

Kungys: Yeah, that's right.

Lynch: You were living in Kedainiai when the Germans came.

Kungys: Yeah.

Lynch: Now on your application for a visa you did not indicate that you were residing in Kedainiai, you indicated that you were residing from 1938 to 1940 in Kaunas and from '40 from '42 in Telsiai and from '42 and '44 in Kaunas. You neglected to indicate that you were residing in Kedainiai from 1939 to 1941. Do you recall why you omitted to mention that?

Kungys: No, I don't I can't recall those things.

Lynch: But you did in fact tell Mr. Fitzsimmons that you were residing in Kedainiai.

Kungys: See, when we were in Germany there was a lot of people had trouble, see. We had those screening committees. They used . . . One week one committee used to come in and say that all ones that declared they ran away from Russians would been thrown out. Because they said you are Nazis. Then the other times committee used to come in and say we were forced by the Germans to come in, otherwise, they . . . Then they used to declare them, say, you are friends of Russians. Things like that. And the people had lot of troubles you know and some people maybe made up (inaudible) and things like that to save their necks the put it because not to be thrown out.

Lynch: Did that concern you?

Kungys: I mean, I don't know. I don't know.

Lynch: You don't recall if that concerned you?

-29-

Kungys: I don't recall that part now. I don't know.

Lynch: I see. But you say people did have trouble making up their mind during those times.

Kungys: Because of those committees. Some committees were, you know, more sympathetic to Germans, not the Germans but against Russians, you understand, and some were like, say, little (inaudible).

Lynch: Could there have been some reason for your leaving out the fact that you desided in Kedainiai.

Kungys: I can't say anything now. I don't remember.

Lynch: You don't remember.

Kungys: How did I do and everything, I don't recall that.

Lynch: Well . . .

Tenev: Did some people at that time for the same reasons that you just said, did they change their place of birth, their date of birth. Is that possible? Were you aware of that? Did people do that?

Kungys: Not over there.

Tenev: No?

Lynch: Where did they do that if anyplace?

Kungys: I don't know.

Lynch: Okay. Well you have no explanation as to why you left off Kedainiai in your Visa Application?

Kungys: No. No.

Lynch: I see. We have other information about some possible activities in Kedainiai in 1941 and I would like to ask you.

Kungys: Yeah, Mr. Fitzsimmons told me.

Lynch: Okay. Maybe I could propose certain names to you to see if you know these people.

Tenev: Do you know a Mr. Antanas Svegza? Does that name mean anything to you? Do you recognize that name?

Kungys: No, not at all.

Tenev: Do you know Mr. Juozas Kriuna?

Kungys: No. Names don't say anything to me. Not those names.

Tenev: Do you know Mr. Andrius Vitkauskas?

Kungys: No.

Tenev: No! Juoza Beranki?

Kungys: Not at all.

Tenev: How about Krajauska Stepona?

Kungys: Strange.

-30-

Tenev: Feliksa Kazokaiti?

Kungys: No. Nothing.

Tenev: Do you know a Mr. Jonas Dailide or spelled
D-a-i-l-i-d-e.

Kungys: No.

Tenev: No! You are sure!

Kungys: Yes.

Tenev: Do you know a Juze Rudzeviciene?

Kungys: Yes. She was here not long ago.

Tenev: Who is she?

Kungys: My wife's sister.

Tenev: Your wife's sister.

Kungys: She was here not long ago.

Tenev: When was she here the last time?

Kungys: I don't know. Two or three years ago, something like that.

Tenev: Do you know a Mr. John Jankunas?

Kungys: No.

Tenev: Do you know Kazis Simulis?

Kungys: Simulis? No. I know one Simulis over here in Nutley.

Tenev: In where?

Kungys: Nutley.

Tenev: Nutley, New Jersey?

Kungys: Yeah.

Tenev: Did you know him in Lithuania.

Kungys: No. I don't really know over here.

Tenev: How do you know that he is here?

Kungys: From parishioners names. That's all.

Tenev: How about Zigmas Knystaustas? Do you recall him? He was the headmaster of the technical high school in Kedainiai.

Kungys: Yes. I knew him just because he was over there. I used to see him when he used to come into bank or something.

Tenev: How about Mr. Antanas Kirkutis. Do you recall that name? The police chief?

Kungys: They changed it, I guess. But I don't know remember. The name doesn't . . .

Lynch: Do you remember the name of any of the police chiefs in Kedainiai.

Kungys: Some they come the name SS, SS something, but not that fellow I don't know.

Tenev: How about . . .

Kungys: Suh, suh, suh something. It was different name.

Tenev: Do you recall Martinas Nagys?

Kungys: No.

Tenev: How about Morkunas, Vitekos Morkunas? Do you recall that name?

Kungys: Vitekos, no.

Tenev: Morkunas.

Kungys: I know Morkunas. Morkunas but . . .

Tenev: In Kedainiai?

Kungys: No, in Kaunas.

Tenev: In Kaunas?

Kungys: Yeah. He was a medical student.

Tenev: Do you recall the name of the mayor of Kedainiai, when you were there?

Kungys: No.

Tenev: How about Kostas Januska, do you recall him?

Kungys: No.

Tenev: No. Edward Snieska?

Kungys: No. There is one Snieska now, a medical doctor over here. I knew he had a . . .

Tenev: Where?

Kungys: . . . In Brooklyn.

Tenev: In Brooklyn and he has a brother. Do you know the brother?

Kungys: I don't know him. But I knew that he had a brother or he has a brother.

Tenev: Is he also from Kedaniai, the one in Brooklyn?

Kungys: Yes. That medical doctor is from Kedainiai.

Tenev: Did you know him in Kedainiai when you were there?

Kungys: No. No. I only know that and I knew the father, you know.

Tenev: The father?

Kungys: The father, the old man, you know.

Tenev: You knew him in Kedainiai?

-32-

Kungys: The father, old man.

Tenev: Snieska.

Kungys: Yeah. He used to come in the bank and deposit money, things like that.

Lynch: What was his business?

Kungys: Some kind of shop he had, something.

Tenev: A machine shop?

Kungys: I don't know. I don't know.

Tenev: A saw mill?

Kungys: Something he had it and he used to come in. That's all I know. And I knew that when they came over here I found his son, that doctor is his son.

Tenev: Do you recall the name Vlada Silestracius? Is that the police chief?

Kungys: No. That name doesn't sound familiar.

Tenev: Antanas Kirkutis, do you recall that name?

Kungys: No. No.

Tenev: Vinca Baseviciu or someone named Bickus?

Kungys: No.

Tenev: Kostas Cereska?

Kungys: Well, I told you. I was there not long enough. Well they exchange the Germans came in this. And then, as I said, I didn't join any social club or anything, I didn't know many people then. Only, I knew one that was a priest.

Tenev: A priest?

Kungys: Yes.

Tenev: In Kedainiai. What was his name?

Kungys: Father Jaunius.

Tenev: Jaunius? How do you spell that?

Kungys: Yeah. J-a-u-n-i-u-s.

Tenev: Where is Father Jaunius now?

Kungys: He's dead now.

Tenev: Where did he die?

Kungys: In Chicago.

Tenev: When did he die?

Kungys: I say you are a little, a couple of years too late. You would have good, good man over there to tell everything.

Tenev: How about Dockus. Do you remember that name?

Kungys: Dockus?

-33-

Tenev: Juozas Davidonis.

Kungys: I don't know.

Tenev: Garsva? Someone named Garsva?

Kungys: I know one priest in Chicago, but not that one I guess.

Tenev: Was he in Kedainiai?

Kungys: I don't think so.

Tenev: Did you know him in Lithuania?

Kungys: No.

Tenev: How about Vilium Gaudzevicius?

Kungys: Strange names, I don't know.

Lynch: The tape ran out as you were asking the last question. Would you re-ask it?

Tenev: Yes. Do you recall the name Vladas Gylys?

Kungys: No.

Tenev: Do you recall the name Maciejka Jablonski?

Kungys: Jablonski, Jablonski not from over there.

Tenev: Not from Lithuania?

Kungys: No there's one was in police but I don't know whether this one or that one.

Tenev: There was a person named Jablonski in the police in Kedainiai.

Kungys: I think so. Somewhere, but not with my association or anything. Some name recalls that, somebody was by that name over there.

Tenev: Do you know Jonas Jankunas.

Kungys: No.

Tenev: How about Feliksa Kazokaiti.

Kungys: No.

Tenev: Do you recall someone named Antanas Kirkutis?

Kungys: You asked me already.

Tenev: I did? What did you say? I'm sorry.

Kungys: No, I don't know.

Tenev: You don't know.

Kungys: Not Kirkutis.

Tenev: Did you know someone else by the name Kirkutis?

Kungys: No.

Tenev: How about Aleksas Kojalavicius?

Kungys: No.

Tenev: How about Kraujailis? Do you recall someone by the name Kraujailis?

Kungys: No.

Tenev: Laurinavicius?

Kungys: No.

Tenev: Domnikas Maszeikas?

Kungys: Maszeikas I have quite a few names but not from over there. I don't think so. The names familiar but overthere, no.

Tenev: How about Aleksas Mekas? Do you recall someone by that name?

Kungys: No.

Tenev: Juozas Merkevicus?

Kungys: I don't know.

Tenev: How about Vacis Morkunas?

Kungys: No.

Tenev: No. Racys Mykolas?

Kungys: Racys? No.

Tenev: Do you know anybody by the name of Mykolas?

Kungys: Mykolas? I know a lot of people by name Mykolas.

Tenev: Were any of them from Lithuania?

Kungys: I imagine so. Because Mykolas is an old Lithuanian name. But the first name.

Tenev: Well, maybe I am not pronouncing it properly but it is spelled Racys. R-a-e-y-s. Is there such a name? What would that name be? How would you say that name in Lithuanian? R-a-e-y-s.

Kungys: R-a-e-y-s.

Tenev: R-a-e-y-s. Is that how you would pronounce it in Lithuanian?

Kungys: Yeah Racys. R-a-s-y. No never heard a name like that. Racimus.

Tenev: You know a Racimus?

Kungys: Yeah. I know one in Brooklyn but not from over there.

Tenev: Is he from Kedainiai too?

Kungys: Who?

Tenev: Racys Mykolas. Racimus, the gentlemen in Brooklyn who just said you knew.

Kungys: No. No.

-35-

Tenev: Is he from Kedainiai.

Kungys: No. No. He is young kid, young kid.

Tenev: How about Stasi Narusevicius?

Kungys: Never heard name like that.

Tenev: Norkus? Plepi? Petras Postauskas?

Kungys: One sound stranger than the other.

Tenev: You don't know that name . . .

Kungys: No.

Tenev: . . . from Lithuania?

Kungys: No. As I said I wasn't active over there, familiar with social or anything, with the groups.

Tenev: How about Jonas Remeika?

Kungys: Not from over there. I knew one over here, but.

Tenev: Was he from . . .

Kungys: No, no, no. He was born over here. One of my good friends.

Tenev: Where was he from? New Jersey or New York?

Kungys: Irvington, New Jersey. But he was born over here. So I know about this name.

Tenev: How about Stasaiti?

Kungys: No.

Tenev: Vasolvas Svabinskas or Salvinskas?

Kungys: No.

Tenev: How about Antana Svegza?

Kungys: No. I think you asked me already, you mentioned.

Tenev: How about Vilcinskas?

Kungys: Vilcinskas. What is first name? One Vilinskas died. He is dead now.

Tenev: Where?

Kungys: In Brooklyn. Maybe that is the same one I know.

Tenev: Was that one from Kedainiai?

Kungys: I don't know where he was from.

Tenev: Did you know him in Lithuania?

Kungys: Yes, I knew him. I don't know where he was from.

Tenev: Where did you know him in Kedainiai?

Kungys: I used to see him in Kedainiai but not him but his wife.

Kungys: His wife was dentist.

. . .

-52-

Lynch: Mr. Kungys, it occurs to us and it may now occur to you, comparing the documents about your date of birth and your place of birth, that you have deliberately misrepresented the date and place of birth and the places where you resided when you made application for a visa to the United States because you had been involved in the activities we have been talking about in Kedainiai.

Kungys: No. I strictly deny that.

Lynch: We have showed you documents that have been about you, certain applications that were written in 1938. . .

Tenev: One of which you identified.

Lynch: . . . that were prepared by you long before these activities which indicated that you were born in 1915 on September 21, 1915 in Riestes, Silales, County.

Tenev: Where you indicated that your father had a farm.

Lynch: Now isn't it a fact that you were born in 1915 in Riestes, Silales County.

Kungys: I said it.

Lynch: You said it?

Kungys: I said where I was born before.

Lynch: The documents that we showed you in your handwriting said that you were born on September 21, 1915 in Riestes, Silales County, Lithuania. Is that where you were born sir?

Kungys: Well, that is your assuming.

Lynch: No. It was in your handwriting, sir. Those documents were prepared by you in the '30's before these activities. Now is it a fact that you were born September 21, 1915 in Riestes, Silales County.

Kungys: I can't say that.

Lynch: You can't say that?

Kungys: No.

Lynch: Notwithstanding, in your own handwriting on these documents, that is what it says. When did you change your date of birth?

Kungys: I don't know that, about that.

Lynch: Isn't it a fact that you changed your date of birth and your place of birth and residence in Lithuania because of the activities in Kedainiai?

Kungys: Not at all. No. I strictly deny that.

Tenev: You were born on your parents farm in Riestes, Silales County?

Kungys: No.

Lynch: Mr. Kungys I have nothing further. If you wish to make a statement you may very well, you go right ahead, sir. Would you like to say something?

Kungys: Well . . . What can I say?

Lynch: Anything you feel like saying.

Kungys: I am being accused of trouble you see. Being accused. Like Russians can throw anything at their means. If I knew I could have brought a witness. A fellow that just, like I says, that you escaped from Russia, from Lithuania. And he swam through Finnish lakes, he walked ten days, and what the Russians are doing now in Lithuania. They are preparing in papers, they got advertising all over the city. The biggest criminal — and they are making a case against him. You gentlemen you don't realize what the Russians can do, if they want to annihilate you. They can do anything.

Tenev: Mr. Kungys, there's just one thing . . .

Kungys: Yes.

Tenev: . . . there is one thing that bothers me. We showed you a number of documents today . . .

Kungys: Yes.

Tenev: ... in your own handwriting.

Kungys: Yes.

Tenev: You identified them.

Kungys: Yes.

Tenev: You identified one of them, several of them I should say.

Kungys: Yes.

Tenev: One of the ones you identified was a document from Telsiai, Lithuania.

Kungys: Yes.

Tenev: Your parents had a farm in Riestriu in Silales. You testified to that. Other documents, which were of the same date in Telsiai, Lithuania, which you filled out

-54-

Tenev: (cont'd) at that time, indicated that September 21, 1915. It just puzzles

Kungys: Yes.

Tenev: ... how it is that your parents had a farm up in Reistriu and you were born in Kaunas.

Kungys: You know what. You know what. I tell you, gentlemen. I tell you one thing, now, with my bleeding heart. I put my hand on my heart but you have to believe it. But you, you are forced in to get me, not to look for excuse for anything because that is your job. I under-

stand that. I understand you. No. No. I tell you it has been bothering me for years. I tell you from the heart now. This, when the Russians take this paper along, which was like that, I was hunted by the Germans at that time and I had to change.

Tenev: Is that why you changed your date of birth?

Kungys: Yes. Help me God. I could drop dead now.

Tenev: Okay.

Kungys: But I had no way to do anything else. Now you can strip me naked. You can take anything away from me. My most precious citizenship what ever you want but I have no way to prove it later. I lost my passport. I lost everything because I had to burn it. I was caught red-handed and I had to change my date birth just because of the Germans. And this is this is heartbreaking testimony now, I'm telling you. Is only lie I have in my life.

Tenev: So in fact you, were born on September 21,
....

Kungys: '15.

Tenev: ... 1915 in Reistriu.

Kungys: But I had, I couldn't change no how. Because if I had change in Germany I had no way to prove it. I lost my papers.

Tenev: Okay. For the record now would you state your true date and place of birth.

Kungys: '15, September 21.

Tenev: 1915?

Kungys: 1915, yes.

Tenev: And where were you born, sir? Your true place of birth.

Kungys: What you have in the records, over here.

Tenev: Would you please state that. In Reistriu village?

Kungys: Reistriu, yeah, village.

Tenev: And is that in Silales County?

Kungys: Silales County. but I had no, no . . . I even came . . .

-55-

Tenev: Do you have any documents which prove that you were born on September 21, 1915?

Kungys: No, I don't have it. If I had it, see

Tenev: But that is your true place of birth.

Kungys: Gentlemen. If I had it I could went to authorities and straighten it out but I had no place and there was bothering me, bothering me all the time. And I even went to one authority over here when I came. Wanted to get it straightened out. He says, it's big bureaucracy, forget about.

Lynch: When did you first decide that you had to change your date and place of birth?

Kungys: In Lithuania. As I said, after this. After this when they all got caught.

Lynch: After the . . . you mean after.

Kungys: During the war, when the Germans were.

Lynch: When the Germans arrested the undergrounds?

Kungys: Yes. I had to run. It was about one or two weeks I was in hiding even. Again, finally, you know, somebody told me change my this and I surfaced again.

Lynch: That document we showed you before where it indicated that you went to the Burgomeister in Kaunas. Did you go there and change your identification in order to change your date and place of birth and give you a new identity.

Kungys: Sir. I don't remember how it was then, and how it was done.

Tenev: If you see the document again.

Kungys: No. No. That won't help me, because it won't help me because I did what was best how to survive. You gentlemen, you didn't go through these ordeals. Is is very hard for you. It wouldn't say anything.

Tenev: When you went . . . I am referring again to this Lithuanian identity document which I showed you previously which has the number 11840 on top.

Kungys: Yeah.

Tenev: You went to the Burgomeister in Kaunas in order to change your name, date and place of birth. Is that right?

Kungys: I guess so.

Tenev: And that was back in 1944. What is the date there? I can't read it.

Kungys: No. This is valid till when

Tenev: Oh, I see.

Kungys: This is valid. This was temporary.

Tenev: That date is April 26, 1944.

-56-

Kungys: April, yeah, 26, '44.

Tenev: And that is when you had this document made up, which contains your false date of birth.

Kungys: No necessarily. You see you didn't have to have it except you could live, say, for a third-year without it. You could have it just temporary permit, you know, where you are working. If you didn't go any place, you didn't get caught or anything, you know, you didn't have to have it at exact at the same date.

Tenev: Would you write your, just so I have the spelling corcectly, would you write your true place of birth?

Kungys: You have over here.

Tenev: I don't know if that is (inaudible).

Kungys: No. No. No. You have plenty of it. No. You show me before on the back.

Tenev: Well. Maybe you could just write it down.

Lynch: Reistes?

Kungys: Reistes. That's only thing you can condemn me for.

Lynch: Mr. Kungys.

Kungys: Yes.

Lynch: You showed us a copy of the certificate you got from the Lithuanian Ex-Political Prisoners Nazi Victims.

Kungys: Yes.

Lynch: And it says, this is to certify that Mr. Kungys, born on 4 October 1913 in Kaunas, Lithuania

Kungys: Yeah.

Lynch: . . . took part in the underground.

Kungys: Yeah.

Lynch: Now that date and place of birth is incorrect, is that correct?

Kungys: Well. But that is according to the papers I had it.

Lynch: But it is incorrect.

Kungys: Well, naturally, everything is correct except the date of birth.

Lynch: I see.

Tenev: And the place of birth.

Kungys: Place. But according to the way I had to go by. Because I couldn't live without the papers and in order to get caught, because they found the papers, that I was there I had to change something. To escape Germans to escape Germans otherwise I wouldn't be caught.

Lynch: Is your wife aware of this? Or do you want to tell me?

Kungys: No. I don't think so.

Lynch: You don't think she is aware of it?

Kungys: She knows that I had to change or something but how, she doesn't know, I don't think so.

Lynch: So it is your testimony that you did not change the date and place of birth because of the activities in Kedainiai?

Kungys: No, sir. No, sir. No, sir. I changed this just because I had to change because of the Germans.

Lynch: And your underground activities?

Kungys: Yes, sir. As I said, once in my lifetime I always thank God I was once late.

Tenev: So the documents we showed you today which had your correct date and place of birth, September 21, 1915 in Reistriu Village in Silales County, those documents, in fact, were written by you. Is that correct?

Kungys: Well, I guess so. The only one thing I say. It bothered me all my

Lynch: Excuse me, Mr. Kungys. Did you want to finish your statement? Do you have anything further to say?

Kungys: As I said you can strip me naked, you can do anything, you can pull my card. I didn't harm anybody in my life or anything even as I said. But that thing bothered me all the time. It bothered me but now whatever consequences I have to pay for. But this was strictly because of my activities against the Germans, and I don't know how the courts will decide whatever this or you decide but I can't say nothing.

. . .

PLAINTIFF'S EXHIBIT K1T

Honorable Mr. Vasiulis,

Please forgive me, that I am intruding into the corner of your home and interrupting your tranquility. However, it seems, that you have heard that the Russian jackals have attacked me.

Having been advised by Father V. Dabasis, I'm turning to you for help in giving testimony. I lived in Kedainiai from December, 1939 until October, 1941. I worked at the Bank of Lithuania. Since times were changing and turbulent, I didn't get to know many people. I belonged to the Riflemen's Association. Now, the NKVD has delivered these lists here. Fr. Dabasis mentioned you to me, spoke well of you, so, perhaps, you could testify to the opponent what you know and what you have heard.

If you would agree, please answer me. I would have to inform my lawyers. We will gladly pay all expenses, if there would be any.

I will wait for you favorable answer.

I will end, wishing you and your wife the best of health and a fine autumn.

With respect,
Juozas Kungys
778 Grove Street
Clifton, New Jersey 07013

September 12, 1981

PLAINTIFF'S EXHIBIT K2T

Dear and Honored Friend,

Thank you for your attention in my matter, your sympathy for me, and, most important, for an answer to my letter. Only after I have been enlightened by the honored Father V. Dabasis, that you know the whole situation well, and, afterwards, having been encouraged, I wrote you a

brief letter with a request to help me. I didn't ask you to testify for me, but only to clarify the situation. They presented before me the longest list of Riflemen's Association members from the commandant's office and kept asking whom I knew.

I don't know why our people are so unwilling to help one another. Just look at how the descendants of Abraham are doing it. The *Washington Post* newspaper described the case of a Chicago Pole who was accused of having participated in guarding concentration camps and other activities. To support this case they brought as many as eleven countrymen from Israel and they all testified they had seen him there. Later it turned out that he was working in Germany at the time, and he was acquitted.

The Pr. Alisaukas that you mentioned was not at the bank then, apparently he worked there in the year before.

The situation in my case has changed somewhat. I've looked for witnesses, and have troubled myself with advertisements. Now it appears that the lawyer is getting addresses from somewhere (maybe from the Immigration Department) and is sounding (them) out on his own initiative.

I write once again, that I don't ask that a stranger would testify for me, only that you would agree to clarify the situation as you have done so well in your letter—I would be very grateful.

I have excellent testimony from my pastor at Kedainiai, Father A. Jaunius. He had promised to help me ably, but unfortunately, The Almighty called him to Himself prematurely.

Expecting your gracious reply

I remain yours

Juozas Kungys

October 5

PLAINTIFF'S EXHIBIT S3A
[CAPTION OMITTED IN PRINTING]

DEPOSITION OF: JULIUS GOLDBERG

TRANSCRIPT taken by and before **MICHAEL DILLON**, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, at the Federal Building, Federal Square, Newark, New Jersey, on Wednesday, July 21, 1982, commencing at 10:10 a.m.

APPEARANCES:

W. HUNT DUMONT, United States Attorney
BY: JOSEPH F. LYNCH, Assistant U.S. Attorney
JOVI TENEV, Assistant U.S. Attorney
 Attorneys for the Plaintiff

IVARS BERZINS, ESQ., and
DONALD J. WILLIAMSON, ESQ.
 Attorneys for Defendant

2

MR. LYNCH: Good morning.

Today is July 21st, 1982. We're taking this deposition at the United States Attorney's Office in Newark, New Jersey.

Those present are Mr. Donald Williamson and Mr. Ivars Berzins, counsel for the defendant. My name is Joseph Lynch and Jovi Tenev. We are trial attorneys with the Department of Justice.

The video tape operator is Thomas Fusi and our witness here this morning is Mr. Julius Goldberg.

This deposition has been authorized pursuant to a court order at a hearing on July 12, 1982. The Court also

authorized that the deposition may be video taped and it is being video taped.

The Court also directed that the deposition also should be reported stenographically and it is being recorded stenographically.

Mr. Reporter, could I request you to swear the video tape operator, that he will accurately record these proceedings.

THOMAS FUSI, sworn as the video tape operator.

JULIUS GOLDBERG, 2651 Palm-Aire Drive So., Pompano Beach, Florida 33060, sworn.

3

Goldberg — direct

DIRECT EXAMINATION

BY MR. LYNCH:

Q. Would you state and spell your name, Mr. Goldberg.

A. My name is Julius Goldberg, J-u-l-i-u-s G-o-l-d-b-e-r-g.

Q. What is your address, sir?

A. 2651 Palm-Aire Drive South, Pompano Beach, Florida 33060.

Q. And are you an attorney at law?

A. I am.

Q. And when were you admitted, sir?

A. In December, 1937.

Q. In what state?

A. In the State of New York, Second Department.

Q. What is your present occupation?

A. I am retired.

Q. What was your former occupation?

A. I was last employed as an immigration judge by the United States Immigration and Naturalization Service.

Q. And when did you start your employment with the Immigration Service?

A. I started in March, 1941.

Q. What was your position at that time?

A. I was a naturalization examiner.

4

Q. Where did you work?

A. In the New York District and in the New Jersey suboffice of the New York District, and later when New Jersey became a separate immigration district, in New Jersey.

Q. And were you in the service during World War II?

A. From 1943 to 1945.

Q. And in 1945 after you were discharged did you return to the Immigration Service?

A. Yes, I did.

Q. And what was your position then?

A. Naturalization examiner.

Q. And where were you assigned?

A. I was in the New York office. New York office for one year after I returned from military service and then I was transferred to the Newark office.

Q. Was that in 1946?

A. January, 1947.

Q. Were you subsequently promoted from a naturalization examiner to some other title?

A. I was promoted to the position of Assistant District Director for Citizenship at the Newark, New Jersey office.

Q. What year was that?

A. 1956.

5

Q. And what was your next assignment after that?

A. I was later promoted 1959 to the position of Assistant District Director, Citizenship at the New York District Office.

And from there, in 1971 I was promoted to the position then called Special Inquiry Officer, but shortly thereafter the title was changed to Immigration Judge.

Q. Where did you serve as an immigration judge?

A. In Newark, New Jersey.

Q. And you said you retired in 1976?

A. Correct.

Q. In 1941 when you started with the Immigration Service, did you receive training to be a naturalization examiner?

A. Yes, I did.

Q. Where did you take that training?

A. In New York City.

Q. Could you describe briefly what training you received?

A. Well, at the time I entered on duty it was March, 1941. A new nationality or naturalization law had come into existence, the Nationality Act of 1940.

And then the Assistant District Director for Citizenship, Mr. Mueller—I believe he spelled that [6]M-u-e-l-l-e-r—gave a training course which took a full month of eight hours a day with breaks in between, of course, to all the naturalization examiners, both the new ones and the old ones.

Q. Mr. Goldberg, I'd like now to direct your attention to 1953.

Where were you assigned and what was your position during that day?

A. At that time I was a naturalization examiner in the Newark office of the Immigration and Naturalization Service.

Q. Describe briefly the duties of a naturalization examiner in 1953.

A. The naturalization examiners had their jobs divided into several categories. There were examiners who

did preliminary interrogations of applicants to file a petition for naturalization before the petition was filed.

And there were examiners who had been designated to conduct hearings on behalf of the courts after a petition was filed and make recommendations to the court.

And there were examiners who appeared in court and presented the recommendation of the examiner who had conducted the hearing.

Q. I see. Mr. Goldberg, would you describe the naturalization process from the time the applicant [7] first files his application.

A. All right. When an application, Form N-400, when that application is received at the office of the Immigration and Naturalization Service, it is attached to the A file.

Q. What is the A file, sir?

A. That was the file which was created by the Immigration and Naturalization Service based on the immigrant visa.

The first document in that file in the case of an alien who had been admitted to the country for permanent residence on the presentation of an immigrant visa, in that file that would be the first document, and all documents are added to that file.

Q. In the Immigration Service they call the immigration file the A file. Does the A stand for alien?

A. Right, I believe it does.

Q. Is there another file called the C file?

A. The C file stands for the certificate file, a person who has been naturalized.

Q. C for citizenship?

A. Citizenship or certificate.

Q. After the A file is ordered, I take it it's sent to the office where the applicant has filed his—

A. In the normal course of events in 1953, the A file [8] was in the district office in which the—in the district in which the man resided, so that if the man had been living in that district for a substantial period before he submitted his N-400, the file should have been there and the file clerk would have pulled it when the application came in and attached it.

Q. Is the applicant's application and the A file reviewed at this time?

A. It is reviewed by a clerk to see if he makes a *prima facie* case of eligibility for naturalization so that an alien is not called in with his witnesses to file a petition for naturalization if he is *prima facie* not eligible.

Q. And if a determination is made that he is *prima facie* eligible, what happens then?

A. He is notified to appear with his witnesses before a preliminary examiner who will interview him and his witnesses under oath before he files a petition.

The purpose of that is to determine whether he should be properly advised not to file a petition because, for some reason, he appears to be ineligible. We don't want him filing a petition, paying a fee if—and going through all

the routine of court hearings if, as a practical matter, he is not eligible.

Q. Would you describe how the preliminary [9] examiner reviews the application to file the petition for naturalization with the applicant.

A. The preliminary examiner picks up the file with the application. He looks through the file to familiarize himself with the background of the case.

He then calls in the applicant alone. The applicant is interviewed under oath not in the presence of either witness so that if he has information to be furnished confidentially, he is in a position to do so.

Q. Does the examiner go over each question and answer with the applicant?

A. The examiner goes over every question on the N-400 and checks off. At that time he checked it off in red ink. That was the procedure.

Q. He physically puts a check mark next to the question and answer?

A. That was the procedure, to show that he did ask that question and that the answer in the application is the correct answer. It is the answer that was given to him.

MR. WILLIAMSON: Mr. Lynch, from now on all the questions which you ask that are leading would be objected to.

A. Do you want me to continue?

MR. LYNCH: Do you want to waive the one [10] counsel rule that you've described as—prescribed in this district?

MR. WILLIAMSON: This is a deposition.

You've already broken it before, so we'll follow the procedure that you've been following in this case.

MR. LYNCH: You agreed that Mr. Tenev during one deposition could examine the witness for a certain purpose.

MR. WILLIAMSON: And then he violated the agreement.

Continue with the witness.

MR. LYNCH: I'll continue with the witness when we've decided that both sides will have an opportunity to object.

MR. WILLIAMSON: I'm not going to reach any agreements with you because I found in the past the agreements are worthless.

We will conduct ourselves in the manner in which we see fit.

Continue the examination, please.

Q. If in checking the application the applicant wishes to change his answer or the examiner determines that it's an incomplete or not responsive answer to the question, what is done?

11

A. Any corrections made on the N-400 as submitted are numbered and the applicant will be asked at the end

of the interview to sign a statement that the corrections as numbered were made by—were made in accordance with his testimony.

Q. And is the applicant required to swear to the contents of the application, including the corrections?

A. The entire interview is under oath. He is sworn before he sits down and he signs the sworn statement that he makes.

The N-400 after he is interviewed reflects his sworn statement even though it is not a verbatim statement.

Q. At the end of the examination by the preliminary examiner, does that examiner certify that the applicant stated in his presence that he had heard and read the foregoing application and understands the contents thereof before verifying that by the examiner's signature?

A. He is asked to sign that statement, yes.

Q. Does the examiner also sign the statement?

A. The examiner signs the statement showing that he administered the oath.

Q. Does the examiner take information from the witnesses?

A. The witnesses are interviewed after the applicant has left the room and they are also interviewed privately. [12] separate and apart from each other.

Q. Is the information that the witnesses give also recorded any place in the application?

A. A summary is made on the—the examiner makes notes, and a summary of what they said to him. It is not a verbatim statement.

Q. Well, is their name recorded on the application?

A. Yes, the name and address of the witness is recorded on the application.

Q. Is this information also recorded on the petition?

A. The name and address will be recorded on the typewritten petition.

Q. After the preliminary examiner is satisfied with the application, what happens then?

A. The applicant and his witnesses are told to go to the office of the Clerk of the Court.

Q. What happens there?

A. The file, the papers are forwarded by messenger to the Clerk of the Court, who types a petition based on the contents of the N-400.

The typed petition is then presented to the applicant for his review and for his signature under oath before the Clerk of the Court, and the typed affidavits of the witnesses which are prepared based on their testimony [13] before the applicant are presented to the witnesses for their oath that the contents are true and for their signature.

Q. Is the affidavit of the witnesses also contained on the back of the petition?

A. It is—it is part of the petition. It is added—it is added on the printed form after the petition itself.

Q. I see. And are the witnesses as well as the applicants sworn in the petition?

A. Yes, they are sworn before the Clerk of the Court.

Q. After the petition has been sworn by the applicant and the witnesses by the Clerk of the Court then what happens to the petition?

A. The pages are then forwarded to—the petition—a duplicate copy of the petition, the original petition is filed with the Clerk of the Court.

Duplicate in the United States District Court at Newark, New Jersey, was forwarded to the designated naturalization examiner with the file for further hearing.

Q. Would you describe that hearing by the designated naturalization examiner.

A. That hearing is by the examiner who is authorized to conduct hearings on behalf of the court.

In the routine case, he would normally conduct the hearing in the presence of the applicant and both [14] witnesses, all three present. They would all be sworn to testify to the truth before him and he would then go over the contents of the petition with them.

Having in mind that the petition had been—had been read to the petitioner before the Clerk of the Court or that the petitioner himself had read it, only the highlights of the petition were covered.

In reading it over. Not in the questioning. I'm talking about in reading it over.

Q. Would the designated examiner have before him the A file and the application?

A. He would have all the papers before him in the routine case.

Q. Was it their routine to review the A file?

A. Absolutely. It was the duty of the examiner to be familiar with the contents of that A file.

Q. Did the designated naturalization examiner ask any new questions of the applicant?

A. I normally asked each applicant or each petitioner—by that time he had a petition on file—I asked each applicant when he had arrived in the United States and how many times he had been out of the United States, where he had gone and how long he had been away, and what documents he presented when he re-entered.

I also asked each applicant, each petitioner, [15] whether he had ever been arrested or been charged with a violation of any law or been convicted of any offense or whether he had any trouble with the police authorities in this area or any other area.

In addition, I asked him whether he had been a member of or affiliated with the Communist Party or with any organization which had been affiliated with the Communist Party in this country or any other country.

I asked him whether he was familiar with our form of government and I asked questions to determine whether he was familiar with our form of government.

I also asked him whether he believed in the principals of our form of government or whether he would prefer some other form of government.

Q. In connection with this examination, would the designated naturalization examiner have occasion to make entries on the petition?

A. Yes, I made notes as to the replies.

Q. What color ink would the designated examiner use?

A. At that time the preliminary examiner used red ink and the designated examiner used blue ink so that the record would show who had made the notes on the examination report.

Q. Did you make a judgment about whether—[16] or an investigation may be required or whether it might be waived?

A. The natural—the designated naturalization examiner had the authority to request further investigation and he had the authority to waive further investigation because the statute provided for further investigation.

Q. Routinely when would he waive an investigation?

A. If he felt that an investigation would be a waste of time and money, that there was no reason to believe that a field investigation would produce anything worthwhile or of any significance.

Q. If everything appeared to be in order, Mr. Goldberg, was the designated examiner required to make some recommendation to the Court?

A. Yes. The designated examiner could recommend that the petition be granted. He could recommend that the petition be denied or he could recommend that the petition be granted but that the facts in the case which raised some issues should be presented to the Court despite the fact that it was recommended to be granted.

Q. If the recommendation was to grant the petition for citizenship, how soon after might the citizen—the petitioner expect to be sworn in as a citizen?

A. That would depend on the backlog in the court. However, there was a statutory period of thirty days [17] after the petition was filed during which the petition could not be heard by the court.

In addition, there was a period of sixty days before election day during which the courts did not hold final naturalization hearings.

Q. While you were assigned as a designated naturalization examiner in Newark in 1953, did you know Manuel Botiello, B-o-t-i-e-l-l-o?

A. Yes, I did.

Q. Was he a lawyer, sir?

A. To the best of my knowledge, he was not.

Q. What was his title?

A. I believed he was an immigration officer. He had been a hearing officer hearing immigration cases for many, many years, but with the advent of the Immigration and Nationality Act of 1952 he was transferred to another position because the Commissioner at that time

had issued some instructions that only members of the Bar, only attorneys could be immigration hearing officers.

Q. Did he thereafter act as a preliminary naturalization examiner?

A. He did.

Q. Was he an acting naturalization examiner?

A. He was an acting naturalization examiner.

18

Q. And you've already described the duties of a preliminary naturalization examiner.

How long did you know him in New Jersey in the IMNS Service, in the IMS?

A. I can't pinpoint the number of years, but it was a number of years.

Q. And what was your opinion concerning his ability as a preliminary—

MR. WILLIAMSON: Objection.

MR. BERZINS: Objection.

Q. Would you answer.

A. I thought he was a very competent experienced and dedicated immigration officer.

Q. Is he still alive?

A. To the best of my knowledge, he died many years ago.

Mr. Goldberg, I show you the original of a copy that has been premarked as Trial Exhibit 10A—excuse me,

A10. It's titled, "Application to File Petition for Naturalization," and I'll show you the original and we'll give the court reporter a copy.

MR. LYNCH: The record will indicate that all the documents that I will be using in this deposition have been provided to counsel in our pre-trial order as pre-marked trial exhibits.

19

MR. WILLIAMSON: Yes. The record will also reflect, of course, these are black and white reproductions that have been furnished to us, and since the witness already indicated there's a red and blue marking system which only your original would show.

Q. Mr. Goldberg, do you recognize the original of Trial Exhibit A10 that I put before you?

A. This is an N-400 application to file a petition for naturalization and I recognize the signature of Manuel E. Botiello, who was the acting naturalization examiner on that application.

Q. Who is the applicant on that application?

MR. BERZINS: Objection. The document speaks for itself.

A. The name on the application is Juozas, J-u-o-z-a-s, Kungys, K-u-n-g-y-s.

Q. And when is it dated, sir?

MR. BERZINS: Objection.

A. Dated October 23, 1953.

Q. And you stated it's signed by Manuel Botiello?

MR. BERZINS: Objection.

A. Yes.

Q. Was that your testimony?

A. Yes.

20

Q. Do you recognize his handwriting?

A. Yes.

Q. Can you tell us if he checked this application in the manner that you described before?

MR. BERZINS: Objection to the form of the question.

A. The application shows that Mr. Botiello conducted the preliminary examination in accordance with the standards prevailing at that time.

Q. Are there check marks, red check marks indicated against each question and answer?

MR. BERZINS: Objection.

A. There are red check marks, yes.

Q. And—

A. The red check marks establish to my satisfaction that he asked those questions.

Q. And were corrections made in this application?

A. There were corrections made.

MR. BERZINS: Objection.

Q. Could you describe how you know there were corrections made?

A. They are numbered.

Q. How many corrections were made in that application?

A. There were six corrections made and the six corrections are enumerated in the oath signed by the [21] applicant.

Q. And does the application indicate that the applicant signed and was sworn to the application?

MR. BERZINS: Objection.

A. The application shows that the application is signed and sworn to by Juozas Kungys.

Q. And does the application indicate that Mr. Botiello verified and certified the application?

MR. BERZINS: Objection.

A. Well, it shows that the application was subscribed and sworn to before him.

Q. And does he certify anything?

MR. BERZINS: Objection.

A. He certified that the applicant stated that he had read the application and heard read the application and understood the contents.

Q. Mr. Goldberg, I show you the original of a copy that has been premarked as Trial Exhibit A11, which is entitled, "Petition for Naturalization."

A. Yes.

Q. Do you recognize this document?

A. Yes, this is the petition for naturalization filed at the United States District Court at Newark, New Jersey on October 23, 1953.

Q. By whom?

22 A. By Juozas Kungys, J-o-o-z-a-s K-u-n-g-y-s.

Q. Does the petition indicate that it was sworn, that it was signed by the applicant and by the witnesses and they were sworn by the Clerk of the Court?

MR. BERZINS: Objection.

A. The application contains the signature of Juozas Kungys and contains the certification by the Clerk of the Court that it was subscribed and sworn to before her.

Q. And who is the Clerk of the Court?

MR. BERZINS: Objection.

Q. That signed—that took the oath of the applicant and the two witnesses?

A. The Deputy Clerk who administered the oath, took the signatures was Augusta Johanson.

Q. Did you know her?

A. Yes, I knew her very well.

Q. Did you know her practice when she was reviewing petitions and taking oaths?

A. It was her practice to ask the petitioner to read the petition before he signed it or if she felt that he couldn't read it, she read it to him.

MR. WILLIAMSON: Objection. Move to strike the last question and answer as calling for hearsay.

Q. Who was the designated naturalization [23] examiner in this petition, sir?

MR. BERZINS: Objection.

A. I was. I was the designated naturalization examiner in this case.

Q. Does that indicate to you that the petitioner, Mr. Kungys, personally appeared before you in the naturalization process?

A. Definitely.

Q. And does this document indicate to you that you personally questioned Mr. Kungys to determine if he was eligible for citizenship?

A. I did. And it established that it was before me, that I personally questioned him.

Q. In connection with your determination as to whether he was eligible, would you have his A file before you as well as his application to file a petition for naturalization?

MR. BERZINS: Objection to the form of the question.

A. I had all papers in the possession of the Immigration Service relating to Mr. Kungys before me at the time I conducted the hearing.

Q. And what type of a review, if any, of the A file would you make in your examination of this application to determine the eligibility of the applicant [24] for citizenship?

MR. BERZINS: Objection to the form of the question.

MR. TENEV: Repeat the question.

(The record is read.)

A. Sufficient review to determine whether there was anything of any significance that I should cover in my examination.

Q. Was it your routine to look for any particular information?

A. I always looked for discrepancies between the testimony of the petitioner before me or before the preliminary examiner and the information contained in the file.

I also looked for information as to absences from the United States, arrests and organizations.

Q. Did you require Mr. Kungys and his witnesses under oath to reaffirm their testimony and affidavits given at the preliminary interrogation?

A. I did.

Q. How do you know you did?

A. It was my invariable practice—

Q. By looking at the petition, Mr. Goldberg?

A. —my invariable practice to ask each petitioner before I finished the interrogation whether all the [25]

statements he made before the preliminary examiner were true or whether he wished to change any of the statements he made before the preliminary examiner.

And I made a record, I had a stamp stating that the petitioner and the witnesses under oath affirmed their testimony and affidavits given at the preliminary interrogation.

I did not put that stamp on until after I had gone through the questions.

Q. And did you put your initials next to the stamp?

A. I put my initials next to the stamp, that's correct.

Q. Did you require any other information as indicated in the petition?

I'll withdraw that question.

Mr. Goldberg, is it your testimony that that stamp and your initials appear on Mr. Kungys's petition?

MR. BERZINS: Objection.

A. This is not the petition on file with the Clerk of the Court. This is the duplicate copy which the law requires that the Clerk of the Court return to the Immigration and Naturalization Service.

The duplicate copy contains my notes. Those are the notes I made at the time of the hearing before me.

Q. And this duplicate copy contains the stamp [26] indicating that you swore the applicant and his witnesses to reaffirm their testimony?

MR. WILLIAMSON: Objection. Leading question. The witness answered before I could object.

A. Right. Yes, it contains that stamp.

Q. With your initials?

A. With my initials.

MR. WILLIAMSON: Objection, leading question.

Q. Are there any other stamps on that petition?

MR. BERZINS: Objection.

A. There's also a stamp saying that he exhibited his alien registration card and that he told me that he had filed an annual January registration card.

Statute provided that every alien had to file an address report card in January. He told me he did.

Q. And did you memorialize that issue by initialing the stamp with your initials on the petition?

MR. BERZINS: Objection.

A. The stamp contains my initials.

Q. Mr. Goldberg, you've testified you reviewed the entire file.

After you have done that, after you had done that, did you determine that an investigation was required?

MR. BERZINS: Excuse me.

MR. WILLIAMSON: I object.

27 MR. BERZINS: I object to the form of the question.

MR. WILLIAMSON: I object to your making reference to what he has. He has not previously testified.

The record will speak for itself. It's an objectionable form of prompting the witness and an improper characterization by you of his testimony.

Q. Mr. Goldberg, answer the question.

A. The record shows that I waived field investigation of this case.

Q. And in what cases would you waive field investigation?

A. Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible.

Q. Does the petition indicate that you did waive the investigation?

MR. BERZINS: Objection. Asked and answered.

A. The document establishes that I waived the field investigation.

Q. Are your initials on that document next to that notation that investigation waived?

MR. BERZINS: Objection.

28 A. Those are my initials.

Q. And why are they there, sir?

MR. BERZINS: Objection.

A. To establish that I was the one who waived the investigation.

Q. Based on the information provided by Mr. Kungys in his application and his petition and upon your review of his A file and your personally examining Mr. Kungys, did you make a recommendation to the court about his eligibility?

A. I recommended that his petition for naturalization be granted.

Q. And how do you know you did that?

A. I see the record before me containing that recommendation.

Q. What does the record say?

A. The letter G.

Q. What does that mean?

A. Means petition be granted.

Q. And how do you know that it was you who recommended that the petition be granted?

A. My signature is right after that recommendation.

Q. Mr. Goldberg, when an alien enters the United States, is he assigned an alien registration number and are all his documents and papers marked with this [29] number to further identify them?

A. Yes.

Q. On the petition that's before you, A11, the original of Trial Exhibit A11 is Mr. Kungys' A file number indicated?

A. Yes, it shows that.

Q. What is it?

A. The alien registration number is A6887153.

Q. Mr. Goldberg, I show you the original of a copy that has been premarked as a Trial Exhibit A3. The original is entitled, "Application for Immigration Visa (Quota)."

Are you familiar with this form?

A. Yes.

Q. And is it usually found in an alien's immigration file?

MR. BERZINS: Objection.

A. It would be found in his immigration file if he had such a visa at the time he entered the United States.

Q. And would it usually be in his immigration file when you were processing his petition for naturalization?

MR. BERZINS: Objection.

A. In the normal course of events, it would be in the A file.

30

Q. I call your attention to the A number in red on the side of the back page.

What is that number, sir?

A. 6887153.

Q. Mr. Goldberg, I'm not sure that I understood the alien registration number that is on the petition for naturalization.

Would you read it again, sir?

MR. WILLIAMSON: Objection.

A. A6887153.

Q. Thank you, sir.

Does A3, the application for immigration and visa, indicate who the applicant is?

MR. BERZINS: Objection.

A. The applicant is shown as Juozas Kungys, J-u-o-z-a-s- K-u-n-g-y-s.

Q. Thank you.

I show you what's a copy—I show you the original of a copy that's been premarked as Trial Exhibit A4. It's entitled, "Alien Registration Foreign Service Form."

Are you familiar with that form, sir?

A. Yes.

Q. Are numbers printed in red on the top indicating his A number?

MR. BERZINS: Objection to the form of [31] the question.

Q. What is the number?

A. The number on the alien registration foreign service form is 6887153.

Q. And looking at that exhibit, Mr. Goldberg, does it indicate it's an application for alien registration by Juozas Kungys?

MR. BERZINS: Objection.

A. It does.

Q. Is this alien registration foreign service form usually found in the A file when you review it while you're processing a petition for naturalization?

MR. BERZINS: Objection.

A. Yes.

Q. I show you the original of a copy that's been pre-marked as Trial Exhibit A7. It's four pages, and it's entitled, "Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention."

Are you familiar with this form, Mr. Goldberg?

A. Yes, that's the N-300 form, and that's the form used by an alien to apply for declaration of intention. That's a preliminary document required for the alien who is filing a petition under the general provisions of the Immigration and Nationality Act.

132

Q. On the top of the form is the immigrant's A number noted?

A. The A number on this form is A6887153.

Q. And does it indicate that it's the application of Juozas Kungys?

MR. BERZINS: Objection.

A. Yes.

Q. And is this form the certificate or the preliminary form for a declaration of intention and an application for a certificate of arrival usually in the A file when you process the petition for naturalization?

MR. BERZINS: Objection.

A. Yes, should be in the A file. Should have been in the A file.

Q. Thank you.

I show you the original of a copy that's been marked, premarked as a Trial Exhibit A—marked as A8, and it's entitled, "Certificate of Arrival."

Mr. Goldberg, are you familiar with this form?

A. Yes.

Q. And is it issued in the name of Juozas Kungys?

MR. BERZINS: Objection.

A. Yes, that is the name on the certificate of arrival.

33

Q. And was that certificate that has been marked as 8A—A8, the result of the application for the certificate that has been marked as A7?

MR. BERZINS: Objection.

A. Yes. The certificate of arrival would have been issued in response to that application.

Q. And is this certificate usually in the immigrant's file when you were processing his petition for citizenship?

MR. BERZINS: Objection.

A. Yes.

. . .

35

Q. Mr. Goldberg, if the applicant in his N-400, the application to file petition for naturalization, [36] pro-

vided sworn testimony that was contradictory to sworn testimony he had provided to the United States counsel in his visa application on matters such as date and place of birth and marital status, would you have recommended denial of citizenship or would you have questioned the applicant about the contradictions and continued the proceeding so that an investigation might be continued?

MR. BERZINS: Objection to the form of the question.

A. If I found contradictions, I would obviously give him an opportunity to explain the contradictions.

Q. And after the explanation, what would you have done?

A. Depending on the explanation. If the explanation established that he had obtained benefits under the immigration laws by false testimony, I might have referred the matter to the Immigration Service to determine whether they wished to take appropriate steps under the immigration laws.

Or if it related to matters in the naturalization proceedings, I would then have to determine whether the change in the testimony was within the locus poenitentiae was within the time allowed to change testimony or determine whether the false testimony was such that I was bound to find that he was not of good [37] moral character and recommend adversely on his petition for naturalization.

Q. If in an application, a petition to obtain citizenship, an applicant under oath swore to a false statement,

place of birth, what action, if any, would you have been obliged to take?

MR. BERZINS: Objection to the form of the question.

MR. WILLIAMSON: Objection to the form.

A. I think I've just answered that. I would have to—if I had his testimony, if I had evidence before me that his testimony was false and it was legally admissible evidence, I would have to determine whether he has changed his testimony in sufficient time before the Government has changed its position.

If the Government hasn't changed its position, I may accept amended testimony. Or if he doesn't change his testimony and the admissible evidence establishes that the testimony was false and I'm satisfied that his testimony was false, I would be compelled by statute to recommend that his petition be denied on the grounds that he was not of good moral character.

* * *

57

Goldberg-Cross

Q. Have you ever heard before you when you were an immigration judge a case where the sole misrepresentation was a person's date and place of birth?

MR. LYNCH: Object to that question. The witness is here as designated naturalization examiner.

You're going beyond direct, and it's irrelevant.

A. I have no recollection of any such case.

Q. As a designated naturalization examiner, sir, did you yourself handle any case where the sole misrepresentation by the applicant consisted of his date and place of birth?

A. I'm—I'm thinking of my reply because of the wording of your question.

I have handled such cases but not necessarily in my capacity as a naturalization examiner. As an immigration officer I have handled such cases.

Q. Well, sir, as a naturalization examiner, is it your recollection that cases of the type that I have described to you never came before you or you have no recollection today of them coming before you?

58

A. Again, it's the way you phrase the question.

The—in my capacity as a naturalization examiner, if I obtained information that a person had given false information in previous applications as to his date and place of birth, I've had many, many, many such cases where people told me that the information contained in the visa was not true, that they obtained their visa using other identities, other documents.

Those cases were referred back to the Immigration and Naturalization Service for the immigration officer to determine what should be done.

In most of those cases there was an avenue of relief under the immigration laws, but it was not decided by me in my capacity as a naturalization examiner, and generally the information was obtained before the petition was filed.

And many of these cases dragged on for a while. In fact, I believe that many of these cases were the reason why Congress made some—added some additional avenues of relief, immigration relief to the statutes.

Q. What are you referring to, sir?

A. Section 241(f) was based on the cases of people who came to the Immigration and Naturalization Service, many of them to the naturalization examiner, and told the true facts about their identity, gave different [59] date and place of birth.

Q. Did you ever have any occasion as a naturalization examiner to get these people back whom you had initially referred to the Immigration and Naturalization Service when they would come back again and apply for citizenship.

MR. LYNCH: Objection. That's been asked and answered.

A. Well, I have no recollection of any individual case, but the normal procedure was when the immigration status was adjusted, under whatever avenue of relief was available under the statute, these people had the normal—the required period of residence and physical presence after the date of lawful admission for permanent residence, whenever that date would be.

Sometimes it was dated back to the original entry and sometimes dated to the date of the adjustment, depending on what statute was used.

If they had the necessary period of residence and physical presence after that date, they could apply for

naturalization, and generally there would be no further problem.

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DEFENDANT'S EXHIBIT 58-D, IN EVIDENCE
TELEPHONE CONVERSATION WITH
FRANK SCHILLING

May 10, 1983 at 6:00 PM, EDT

FS Hello?

DJW Good afternoon. Is this Mr. Frank Schilling?

FS Yes.

DJW. Alright. Mr. Schilling my name is Don Williamson. I am an attorney here in New Jersey and I represent an individual by the name of Juozas Kungys—K U N G Y S, and a lawsuit has been brought against him in connection with the revocation of his citizenship and in the process the immigration file was produced and you are listed as the individual who interviewed Mr. Kungys when he applied for a visa in Stuttgart, Germany in January of 1947.

FS—Right.

DJW—The reason I'm calling you is that there's certain background information which I would like to have you provide, if you are willing to do so. For example, do you recall at that time what the criteria was for the granting of an immigration quota visa?

FS—That would be available to you in Washington at the State Department.

DJW—Well I have the regulations, and the regulations, of course, indicate that at the time that the priorities were given to displaced persons but were there any other criteria as to which...

FS—Not that I remember. I don't remember any of the qualifications at all that were necessary. That's a long while ago.

DJW—Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact been a victim of Nazi persecution?

FS—No. That I don't remember either.

DJW—You have no recollection that there was any such policy?

FS—That's right.

DJW—Do you have any recollection as to what the nature would have to have been of a person's occupation in one of the occupied countries in order to make him ineligible?

FS—No. I have no recollection at all on that.

DJW Were you ever interviewed by any of the attorneys for the Dept. of Justice in connection with this case?

FS No I had a couple of telephone calls, that's all. I offered no information just like I'm not offering any information now because I have no recollection of what happened at that time.

DJW In the process of trying to locate where you were, I made inquiry of the State Department of the re-

tired Foreign Service officers and I was surprised to find that your name was not listed there.

FS That's very possible.

DJW Were you in a private service or were you with the Immigration Dept.?

FS I was in the State Department.

DJW Oh, you were, and are you now a retired Foreign Service officer?

FS No I am not.

DJW So you are not retired then?

FS That's correct.

DJW Oh. Can I inquire as to the nature of your present position?

FS No. A retired person, that's all.

DJW Let me ask you, are you presently in sufficient health that you could come to testify?

FS No.

DJW May I inquire as to the nature of your health?

FS Yes. Not good.

DJW Is it such that you cannot travel?

FS That's correct.

DJW I'm very sorry to hear that.

FS I told the same thing to the individual that called from the Department of Justice too.

DJW I can understand your concern.

DJW Do you recall during that period of time any difficulty with people obtaining birth certificates to prove their date and place of birth?

FS Well everybody had some sort of difficulty getting their paperwork, I don't remember any special difficulties, no.

DJW Do you recall that most of the people from the Baltic countries could not produce the birth certificates?

FS That I don't remember.

DJW Do you recall that there were a number of people who produced identity certificates in lieu of birth certificates which contained what appeared to be incorrect dates and place of births.

FS I think that all of these things are on record with the State Department, and I don't see any reason at this point now to bother me with the questions that you have in mind. I'm really not interested; its just a long while ago and I'm really not interested in this.

DJW I can appreciate your not wanting to be inconvenienced, but I have a severe problem in the sense that the Department of Justice . . .

FS Well the answers to these questions you're asking are on record with the State Department.

DJW Well, it's not on record.

FS I issued hundreds of visas, I interviewed hundreds of visas, I'd never be able to pick out one particular case or individual. I never heard of the individual you are talking about.

DJW You have no recollection of Mr. Kungys?

FS Absolutely not.

DJW Do you have any recollection of dealing with any Lithuanian political groups in the Baltic camps?

FS Absolutely not.

DJW Do you have any recollection that it was understood at the time that many of the Lithuanians had to obtain false identity cards in order to escape mobilization?

FS Not to my knowledge, I don't know whatsoever. That wasn't my job.

DJW When you interviewed these people, were these fairly perfunctory interviews lasting just several minutes or were they long interviews?

FS Well it depended on who it was. You can't take a general cut across the board on that. Some were shorter, some were longer.

DJW Was some of the interviews as short as say 5 minutes or so?

FS Well, that I couldn't say.

DJW Do you recall that priorities were given to people who had relatives in the United States?

FS Now, once again, you can find that in the State Department policy not from me. I was an individual working for the State Department and at this point in time, I see no reason why I should start to delve into my memories, which I don't have any.

DJW Well, is it fair to say that the . . .

FS You're talking about a situation that occurred in 1947. Why should I be bothered about it now?

DJW Well the problem is that this individual, they are seeking to revoke his citizenship and deport him to the Soviet Union; and that the only person in fact who dealt with him was you, so were trying to . . . the only person we can turn to is you, unfortunately.

FS Well, unfortunately, I don't remember the individual nor the situation.

DJW Do you recall at that time the only policies that governed the admission of aliens or the eligibility of visa applications were the ones that were actually written down? You followed strictly the written down directives?

FS I don't remember. You're just wasting my time when you're asking that type of question.

DJW Well, do you recall whether or not it was fairly common knowledge that many of the people whom you would be processing would not have correct dates and place of birth?

FS This I don't know. Like I said, I don't remember. Why should I start why should I bother myself at this point in time over things like that? I'm not getting paid for it; I have no interest in it whatsoever.

DJW Well because it's of serious concern for another individual who . . .

FS Well that's his problem not mine. I don't even know the individual, never heard of him, don't even know there was such an individual.

DJW Did you ever reject any applicants while you were there? Do you remember any of that?

FS Again, it's something I don't remember.

DJW Do you recall the conducting any investigations into the peoples' backgrounds?

FS Again this way too, you're just wasting my time on this. I'm a private individual living quietly, nobody's bothering me and I'm not bothering anybody else. As far as this individual is concerned, I have absolutely no interest in his way, one way or the other. Whether—what he is being charged with, that's strictly his trouble.

DJW And you have no interest in helping him?

FS Why should I?

DJW Well, as a matter of Justice—

FS I don't even know who he is.

DJW O.K. Thank you very much for giving me of your time.

FS Yeah, you're sure welcome.

DJW Alright.

FS Bye.

(p. 541) SEYMOUR MAXWELL FINGER, being first duly sworn, testifies as follows:

THE CLERK: State your full name.

THE WITNESS: My name is Seymour Maxwell Finger.

DIRECT EXAMINATION

(p. 542) BY MR. TENEV:

Q Would you please spell your surname?

A -Finger, like the finger on your hand, F-i-n-g-e-r.

Q Where did you do you reside, sir?

A I live in Rockville Center, New York.

Q And are you employed?

A I am a professor in the City University of New York.

Q Apart from being a professor in the City University of New York, do you hold any other positions there?

A I'm director of the Ralph Bunche Institute, the United Nations, which is part of the graduate school of the City University.

I have certain consultancies, ad hoc.

Q Would you speak up, please? I have a little trouble—

A I say I have certain consultancies ad hoc.

Q Before you entered academia, did you have any other employment, Mr. Finger?

A Yes. I was a career foreign service officer for 26 years, ending in September 1, 1971, at which time I became a professor in City University.

THE COURT: What date was that?

(p. 543) THE WITNESS: September 1, 1971.

THE COURT: Thank you.

Q As a foreign service officer, in what positions did you serve?

A I was first a vice-consul in Stuttgart, Germany, then second secretary in Paris, second secretary in Budapest.

Subsequently, a second secretary in Rome. First secretary in Vientiane, Laos, and then for 15 years with the United States Mission to the United Nations.

Q What position did you occupy at the United Nations, sir?

A I started as economic adviser, and I ended the last five years as ambassador and senior adviser.

Q So for the last five years you served as ambassador and a senior adviser to the—

A To the permanent representative of the United States to the United Nations.

Q Have you served in the United States Armed Forces?

A Yes. I served for three years during World War II.

Q Under what commands did you serve and in what theater?

A I had two years in the European Theater of (p. 544) operations, Third Army, General Patton, subsequently, 12th Army Group, General Bradley, and then again with General Patton's Third Army.

Q When did you join the State Department?

THE COURT: What capacity were you in the Third Army?

THE WITNESS: I was doing signal center work and liaison with the French. I was in a special unit that carried out liaison with the French army.

THE COURT: Okay.

Q Ambassador Finger, when did you join the State Department?

A In January, 1946.

Q At the time that you joined, were you hired for a specific position or a specific task?

A Yes. I was hired as an vice-consul some to go to Germany.

Q Were you given any training at the time you began employment with the State Department?

A Yes. We had training in the processing of visas, which was to be my assignment in Germany.

Q And where was that training given?

A In the Department of State, Visa Division.

Q And at that time were you given materials to study?

(p. 545) A Yes, we were.

Q What kind of materials were you given, sir?

A Well, the Immigration Act of 1924 and the various regulations of the Immigration and Naturalization Service that were issued pursuant to that Act.

Q Were you given visa forms, as well, to examine?

A Yes.

Q After your training in Washington, what assignment were you given, Ambassador Finger?

A I was assigned to the American Consulate in Stuttgart, Germany.

Q What was your position at the American Consulate at Stuttgart, Germany?

A Vice-consul.

Q When did you arrive at Stuttgart, and how long did you remain there?

A I arrived toward the end of January, 1946, and remained until May, 1949.

Q Throughout the time that you served at Stuttgart, were you a vice-consul?

A Yes.

Q In brief terms, when you arrived at the United States Consulate at Stuttgart, what were your duties there?

A To process visa applications.

Q How many other vice-consuls were at Stuttgart (p. 546) at that time processing visa applications?

A Nine, as I recall it.

Q Do you know if the other vice-consuls received the same sort of training and indoctrination as you, sir?

A Yes, they did.

Q Was there a uniform set of standards and procedures which were routinely applied to processing immigration visas at Stuttgart?

A Yes.

Q And did the consulate receive from the State Department periodic communications or additional directives regarding the processing of visa applications?

A Yes, it did.

Q Were you required to follow the standards and procedures applied to processing immigration visas at Stuttgart?

A Yes.

Q In the course of your employment at Stuttgart, Ambassador Finger, did you have the opportunity to become familiar with the work of the other vice-consuls there?

A Yes, I did, sometimes in official meetings, sometimes socially.

Q And did you and the other vice-consuls at these meetings and contacts exchange information regarding the

sorts of problems or issues, if any, which arose in the (p. 547) processing of visas?

MR. WILLIAMSON: Objection, hearsay. —

THE COURT: No, not yet. Overruled.

A Yes, we did occasionally talk about cases that we had reviewed.

Q Do you know Frank Schilling, S-c-h-i-l-l-i-n-g?

A Yes.

Q Was Frank Schilling a vice-consul at Stuttgart at the time that you were there?

A Yes.

Q Did the other vice-consuls at Stuttgart, to the best of your knowledge, routinely follow the standards and procedures which were applied to processing immigration visas?

A Yes.

Q While you were at Stuttgart, Ambassador Finger, approximately how many immigration visa applications did you process?

A About 1500.

Q In brief, what were your duties as a vice-consul with respect to the processing of immigration visa applications?

A To review the file, interview the applicant, and make a decision as to his eligibility.

Q Was the decision as to eligibility made by the (p. 548) vice-consul a final decision?

A Yes. Letters might be written to the Department of State, but any case was then referred back to the vice-consul for decision.

Q What were the routine procedures followed once a decision had been made to deny a visa application?

A We would inform the applicant, the State Department and the other consulates in Germany.

Q What was the purpose of informing the State Department and the other consulates in Germany of the rejection?

A Because of the possibility that the applicant might apply elsewhere.

Q In making application for an immigration visa, did the applicant bear the burden of proving his eligibility?

A Yes.

Q During your tenure at Stuttgart, Ambassador Finger, in processing visas, what types of visa applications did the consulate accept for processing?

A There were two types. We had first preference visas for close relatives of American citizens, and then visa applications from persons who had been victims of Nazi persecution.

Q Were both these types of applications quota (p. 549) visas?

A Yes.

Q Would you describe in detail, Ambassador Finger, the procedures an applicant followed in applying for an immigration visa?

A He would either himself come to the consulate to pick up preliminary forms that would provide necessary information, or might receive those forms from one of the agencies that was assisting prospective immigrants at that time.

Q Now, after filling out those forms, what step would the applicant then take?

A He would bring the forms to the consulate where they would be reviewed, usually by local employees who would, if they found them satisfactory, type out a request, an immigration visa request, and an alien registration form.

Q What would the next step be after that application—those two applications were typed out?

A Those two forms, plus any other relevant information, would be placed in a file to be given to the vice-consul who would look at the file, and if he considered it to be in order, would schedule an oral interview with the applicant.

Q Now, on the basis—what transpired at the oral interview once it was scheduled, and who conducted the (p. 550) oral interview?

A The vice-consul would conduct the interview directly if the applicant spoke English, and in my case, if he spoke either English or German or French. If there was not a common language between the vice-consul and the applicant, then an interpreter would be provided.

Q What was the subject of the interview?

A We would look into the statements made, particularly in the application for a visa, to try to authenticate the identity of the applicant, the authenticity of the statements made.

We would look, in particular, into his residence and occupation during his adult lifetime, and particularly during the period 1939, 1945.

Q After the interview was completed and answers had been given—

THE COURT: Excuse me. Particularly what years?

THE WITNESS: 1939 to 1945.

THE COURT: Thank you.

Q Ambassador Finger, why was special emphasis given during the interview to questioning the applicant concerning the period 1939 to 1945?

A The bulk of the applicants were from Eastern Europe originally. Hitler's persecution of victims in (p. 551) Eastern Europe dated from the invasion of Poland forward.

Q Of what relevance was that to determining eligibility?

A We wanted to know what had happened to that individual during Nazi occupation of a particular country, whether it be Poland, or Russia, or one of the Baltic states.

Q After the interview was completed, was the applicant asked to do anything?

A Yes. Of course, during the interview we asked extensive questions, and in particular, I made it a point

to pause after each of the 31 questions concerning grounds for eligibility, at the bottom of the application, to give the applicant a chance to affirm or deny whether he fell under one of those grounds for exclusion.

After that, I would ask the applicant to affirm or swear as to the truth or the statements made in the application.

Q Was that a routine practice to review all the entries in the application formation and have the applicant swear to the truth of the entries?

MR. WILLIAMSON: Objection, hearsay.

THE COURT: Overruled.

MR. WILLIAMSON: Not present while the other vice-consuls are conducting it. He can't tell what's (p. 552) routine and what isn't.

THE COURT: Yes, I think he can. I'll overrule the objection.

A Well, every vice-consul had to have the applicant swear or affirm before him as to the truth of the statements made on the application. That was required by law and was standard practice.

Q Ambassador Finger, earlier in your testimony you mentioned that there were other relevant materials contained in the file which was examined by the vice-consul prior to the interview.

Would you tell the Court what kinds of materials, other than the preliminary form of the application form you described, might be contained in the file, or typically were contained?

A Well, a birth certificate wherever possibly obtainable, and a police record.

Q Ambassador Finger, was the applicant required to provide a photograph of himself as part of his application?

A Yes.

Q Was that to be a photograph of a certain type?

A Yes. The forms that were given to them specified that it would be a head and shoulder photograph with a light to medium background. There were (p. 553) specifications. And it had to be a recent photograph.

Q Was the applicant required to provide any identity documents apart from a birth certificate?

A Yes. If, of course, he were a resident, he would be —of a town in Germany, he would be providing a police record. In cases where a birth certificate simply could not be obtained, then we would accept certain other documents that appeared to authenticate the date, place of birth and identity of the applicant.

Q Ambassador Finger, about how long would such an interview last on average during your experience?

A About a half hour.

Q Were the applications of a husband and wife processed and considered together with each other?

A Yes.

Q And did the Department have any policy with respect to issuing visas to spouses, that is to say, was it possible for one spouse to receive a visa and not for the other spouse to receive a visa?

A Only if one spouse was not eligible for immigration, assuming both were eligible for immigration, our policy was to process them together.

Q Prior to signing the visa application and alien registration forms, was the alien allowed to make any corrections, if necessary, to those forms during the (p. 554) interview?

A Yes. If it were clearly an oversight and not a deliberate, wilful, falsification of something significant.

THE COURT: Which forms are you talking about?

THE WITNESS: We are talking, sir, about the request for an application for a visa, and then the alien registration form.

Q At the conclusion of the interview, Ambassador Finger, did the applicant sign each of those forms?

A. Yes, he did.

Q What was the next step in the process after the applicant was interviewed by the vice-consul and the forms that you described were sworn and signed by the applicant?

A They were then forwarded to the consul who, when a visa—quota number became available, would issue the visa.

Q That's assuming that the vice-consul was satisfied with what had transpired at the interview?

A Oh, yes. It would not be forwarded to the consul unless the vice-consul decided that the applicant was eligible.

Q Did the vice-consul also sign those forms?

A Yes.

Q Were any applicants issued immigration visas without first being interviewed by the vice-consul in the (p 555) manner that you described?

A To my knowledge, no.

Q So then the interview was a mandatory requirement?

A Yes.

MR. WILLIAMSON: Objection. He's leading a very intelligent witness who is an expert on the matter. He continues to lead him in these particular areas, and I object to it.

THE COURT: No, I don't think that was impermissible leading. Overruled.

Q Ambassador Finger, as a matter of routine, was each entry in the visa an alien registration form reviewed with the applicant by the vice-consul at this oral interview?

A Yes.

Q Ambassador Finger, you mentioned previously that applicants were required to submit documents to support their applications. You mentioned one of the documents was a birth certificate, and you also mentioned that the birth certificate was unavailable, that alternate forms of identity documents were acceptable.

You also mentioned that police records were required. Were any other types of supporting documentation required to be submitted by the applicant?

(p 556). A Well, this would depend upon the case. Clearly, if no birth certificate were available, you might

require more documentation of it in terms of volume. If a person had lived in three or four places where police records were available, and you had only one, you might want to get further police records.

If there seemed to be dubious features about the places of residence given, you might want additional information about that.

Q Ambassador, I'm going to hand you the originals of two documents, Plaintiff's Exhibits A-3 and A-4.

MR. TENEV: Your Honor, for the record, certified copies of these documents will be offered into evidence at an appropriate time. I would like to show the witness the originals now, if I may.

THE COURT: Yes.

MR. TENEV: Mr. Einerson will hand up the certified copies.

Q Ambassador Finger, handing you Plaintiff's Exhibit A-3 and A-4 for identification, will you please tell the Court what those documents are and if you recognize them?

A Yes, I do. I recognize them. A-3 is an application for immigration visa quota. A-4 is an alien registration form.

(p 557) Q In what name are those two documents? Who is the applicant

A Juozas Kungys.

Q Are those documents signed?

A Yes, they are.

Q By whom are they signed

A By Mr. Kungys and by Frank Schilling.

Q What is the date of the signature, if you know?

A January 9, 1947.

Q Do you recognize these documents, Ambassador Finger?

A Yes. I saw at least 1500 sets of them.

Q Now, is there information contained on the immigration visa and the alien registration form concerning the applicant's date and place of birth, residences and occupations?

A Yes, there is.

Q Based upon your knowledge of the standards and procedures at Stuttgart, who is the source of the information concerning the applicant?

A The applicant is the source of the information.

Q Now, by examining the face of A-3, the visa application, is it possible to determine whether the applicant submitted a birth certificate?

A Yes. It says, "birth certificate not (p 558) available," toward the bottom of that applicant for a visa.

Q Ambassador Finger, at this time I would like to show you Government Exhibit A-6. I would ask you if you can identify that document?

A Yes. This is a document from the National Delegate of the Vatican for the Lithuanians in Germany and Austria, who states that according to documents submitted

to him, and according to the depositions of sworn witnesses drawn up on January 16, 1947, the following birth certificate of Juozas Kungys existed in the original which had been left in Lithuania. It states that on October, 1913, a child named Juozas, born on October 4th, 1913, at Kaunas, in Lithuania, of the legal matrimony of Juozas Kungys and Ona Gerulity, was baptized in the Roman Catholic Church of Holy Trinity in Kaunas.

Q Based upon your knowledge of the procedure at Stuttgart, is this the type of document an applicant would submit if his birth certificate were unavailable for some reason?

A Yes, it is.

Q Now. I ask you to look at Plaintiff's Exhibit A-1 and ask if you can identify that document?

A Yes. This is a provisional identity card issued by the Municipality of Kaunas, Bureau of Passports for the Interior, issued in the name of Juozas Kungys.

(p. 559) Q Does the document indicate the date of issue, Ambassador Finger?

A Yes. It is issued on April 26, 1944.

Q Drawing your attention to the translation which is a part of A-1, and specifically to the rubber stamp down at the lower portion, would you read that rubber stamp, please?

A It reads, "For conformity of translation to original, January 10, 1947," and the stamp is from the Baltic Camp in Stuttgart, Felbach.

Q Do you recall the Baltic Camp at Stuttgart, Felbach?

A Yes.

Q In the case of a document which was required to be translated, did, in your experience, visa applicants go to the Baltic camp for purposes of obtaining translation of documents?

A Yes, because we did not have at the consulate people who knew the Lithuanian language.

Q Based upon your knowledge of the procedures and routines at Stuttgart, and your experience, there, is this document the sort of document an applicant would submit in order to establish his identity for purposes of applying for a visa?

A Yes, it is.

(p. 560) Q I would now like to hand you Plaintiff's Exhibit A-2 and ask that you identify that document.

A Yes. This is a statement dated June 19, 1946, issued by the Lithuanian ex-political prisoners, that's Nazi victims, central committee. The certificate certifies that Mr. Juozas Kungys, born on 4 October, 1913, at Kaunas, Lithuania, took an active part in the Lithuanian anti-Nazi resistance movement and was persecuted by the Gestapo.

Q Ambassador Finger, what significance, if any, for eligibility purposes, would such a document be?

A Very significant, because the policy under which we operated emphasized that visas would be granted to persons otherwise eligible who are victims of Nazi persecution.

Q Would this document also be used to establish identity in the case where a birth certificate were unavailable?

A It could be one supplementary document indicating identity, yes.

Q I would like to ask you to look at Plaintiff's Exhibit A-5 for identification, and would you tell us what that document is, please?

A Yes. This is a police record which was routinely required from any applicant.

Q Where is that police record from, sir?

(p. 561) A This record was issued in Felbach, to the name here, Joseph Kungys.

Q What does that document signify?

A That there were no known disadvantageous facts, or especially any previous convictions listed on the police record.

Q Is this the sort of police record that an applicant would be required to submit for purposes of establishing his eligibility for a visa?

A Yes, it is.

Q Ambassador, based upon your knowledge of the routine procedures and standards followed at Stuttgart, are the documents you just examined, that is to say, Plaintiffs A-1, the identity card, A-6, the Vatican birth record, A-2, the persecution certificate, A-5, the police record, are these the types of documents a visa applicant would submit in order to establish his eligibility for a visa?

A Yes, they are.

Q Ambassador Finger, if for some reason the authenticity of an applicant's supporting documents were called into question, what action, if any, would the vice-consul take?

A We would first check police records in any prior places of residence, particularly in Germany where such records were available.

(p. 562) We might raise questions with the sponsoring agency because they had in each case a director familiar with our procedures and policies and regulations, and were usually very cooperative because they had very many cases before us.

Q Ambassador Finger, as part of this investigation, were you also checking the lists of rejected visa applicants?

A Yes, we would.

Q Would that be done as a matter of routine practice?

A Yes, it would.

Q Ambassador, if an applicant gave information in his application forms, or during his interview which was inconsistent with the information on his supporting documents, would the authenticity of those supporting documents be called into question?

A Yes, sir.

Q And under such circumstances, as a matter of routine practice, would an investigation of the sort you

have just described have been conducted by the vice-consul?

A It certainly would have, yes.

Q Ambassador, what routine action, if any, was taken with respect to immigration visa applicants who submitted documents containing false information, but (p. 563) withheld from the vice-consul other documents containing true information?

A If false information was submitted on the visa application, the visa would be denied.

Q If an applicant withheld from the vice-consul documents containing true information, what action would be taken as a matter of routine practice?

A Well, if he withheld them, we never saw them, obviously there is nothing we can do.

If, subsequently, we were aware of the true information which contradicted the false information submitted on the application, we would deny the visa.

Q What routine actions, if any, would be taken with respect to an applicant who lied under oath to the consul concerning his date and place of birth?

A We would deny the visa. We would inform the Department of State as well as the applicant, and we would inform all other consulates in Germany.

Q With respect to applicants who lied under oath concerning their wartime occupations, Ambassador, what occupation as a matter of routine would be taken?

A Exactly the same.

MR. WILLIAMSON: Objection. No foundation.

THE COURT: What do you mean no foundation?

MR. WILLIAMSON. There is no foundation in the (p. 564) record that there is any indication from this particular witness that any of his wartime occupations were not accurately reflected either in the internal passport or the other information available to—

THE COURT: It's the government's contention that there was.

MR. TENEV: That's correct. And furthermore, Ambassador Finger already testified that the applicant was required to give truthful information in the applicant forms concerning wartime occupation, and that a special emphasis was given to those matters.

THE COURT: I'm going to permit the testimony. If the evidence is such that no false information was given in this respect, then no harm done. So we'll receive the testimony.

Q Ambassador Finger, with respect to an applicant who lied under oath concerning his wartime residences, or residence, what action, if any, as a matter of routine, would be taken?

A The visa would be denied.

Q Ambassador, if an applicant claimed to have been persecuted by the Gestapo during the period of the war, but in fact had not been persecuted by the Gestapo, what action would be taken?

A The visa would be denied.

(p. 565) Q Ambassador, if the vice-consul had become aware that an applicant lied about his date and place of birth to the United States officials, but had, prior to making application, told German officials in another part of the country the truth regarding these matters, what application—rather, what action would be taken as a matter of routine?

A The visa would be denied.

MR. WILLIAMSON: Objection. No foundation. I would like to continue the objection.

THE COURT: Yes, there can be a continuing objection. I understand your objection.

As I understand it, the government proposes to offer proof that this, in fact, occurred.

MR. TENEV: That's correct.

THE COURT: And on that representation, I'll permit the testimony and if it should be that the government fails in its proofs, then the testimony will be irrelevant and will be disregarded.

MR. TENEV: For the convenience of the witness, I would ask the reporter to read back my question.

THE COURT: Yes.

(Record read.)

Q Ambassador Finger, what routine action, if any, would be taken with respect to an immigration visa applicant (p. 566) who failed to reveal his two-year employ-

ment as the manager of an industrial concern or a factory in Nazi occupied Lithuania?

MR. WILLIAMSON: Same objection.

THE COURT: All right, same ruling. You may

A The visa would be denied if he had served in a managerial capacity. Not as a slave laborer.

Q Well, if a consul or officer had become aware that a visa applicant had participated with Nazi forces in either the persecution or murder of Jewish civilians, what action would be taken with respect to such an applicant?

A The visa would be denied.

Q Ambassador Finger, as a matter of routine practice, was an applicant for a quota visa required to prove his country of birth?

A Yes.

Q What proof was required and how was this done?

A The normal proof was a birth certificate. If the birth certificate could not possibly be obtained, then the applicant was required to present certain other documents which were credible evidence of date and place of birth.

Q Will you explain to the Court what a quota immigration visa is, please?

(p. 567) A It's based on the Immigration Act of 1924. Each country was allocated a certain number of potential visas for applicants.

Eligibility was determined by the place of birth.

Q Could a quota immigration visa be issued to an applicant who failed to establish his country of birth by producing the documentation that you have described?

A Could not.

Q Could I have the answer again, please?

A No.

Q If an applicant submitted false documentation or documentation containing false information, would he have established his country of birth for purposes of obtaining a quota visa?

A No.

Q Ambassador, for purposes of obtaining a visa, was it sufficient that an applicant provide truthful information only about his nationality?

A No, not only about nationality, but, of course, his identity, his wartime activities.

. . .

(p. 568) Q Ambassador, for purposes of obtaining a visa, was it sufficient that an applicant provide only information concerning his nationality?

A No. He also had to provide evidence of date, place of birth, his identity, a police record and some record of his occupation during his adult life, and particularly that period of 1939, 1945, which was especially important in the case of those living in Eastern Europe.

Q Was an applicant who was persecuted by the Nazi's eligible for a visa on that basis alone?

A No. This would be, of course, one aspect of eligibility. But in addition to that, the applicant had to have proof of birth, a police record showing no previous criminal activity, and, of course, not be excludable under any one of the 31 grounds that are at the bottom of that application visa.

MR. TENEV: Might I have a moment, your Honor?

THE COURT: Yes, certainly.

(Pause.)

Q Ambassador Finger, just a couple more questions. You testified that interpreters were available (p. 569) during the interview conducted by the vice-consul, is that correct?

A Yes.

Q Where were those interpreters obtained from?

A The consulate itself had local employees who usually knew two or more languages. Occasionally, if there was a language that we could not cover with our own employees, an outside interpreter could be brought in.

Q In such cases, in the latter case that you described, would an interview ever be conducted where there was a language problem?

A No. Either there would be direct questioning where the applicant and the visa officer had a common language, or there would be questioning through the interpreter.

Q Well, you said there were outside interpreters. Where were those outside interpreters obtained from?

A In the case of rare languages we would go to wherever such people could be found who spoke either the rare language plus German, or the rare language plus English.

Q Ambassador Finger, have you, during your tenure at Stuttgart, processed any visa applications under any provision of law except the Act of 1924?

A No.

(p. 570) MR. TENEV: I have no further questions at this time, your Honor.

THE COURT: All right, cross-examine.

MR. WILLIAMSON: Your Honor, I think at this time I would ask that the mid-morning break be appropriate.

THE COURT: All right. We'll take a brief recess. You can step down and come back about ten or 15 minutes. Good.

(Recess.)

SEYMOUR M. FINGER, resumes:

THE COURT: Yes, Mr. Berzins.

CROSS-EXAMINATION

BY MR. BERZINS:

Q Mr. Finger, while you were a vice-consul in Stuttgart, did you ever interview Juozas Kungys, the defendant in this action?

A No sir.

Q Did you ever, during that period of time while you were vice-consul in Stuttgart, review the file pertaining to a person named Juozas Kungys.

A No.

Q Did you ever discuss an applicant named Juozas Kungys with Frank Schilling?

A No.

Q When did you for the very first time hear the (p.571) name Juozas Kungys?

A When the government attorneys came to see me about the case.

Q Did you, yourself, conduct in Stuttgart any interviews of applicants who were Lithuanian?

A Yes, indeed.

Q How many, sir?

A I would say in the dozens. Hard to tell you exactly how many.

Q Do you have a recollection of the geographic location in Lithuania from where they came?

A Oh, yes.

Q Where, sir?

A Well, it is in Eastern Europe, north of Poland, east of what used to be the Soviet Union, now a part of the Soviet Union.

Q Mr. Finger, perhaps you didn't grasp my question.

Do you have a recollection of the localities from where came the Lithuanian applicants that you did interview?

A Oh, yes. Stuttgart. Fellbach was a suburb of Stuttgart.

Q Off the top of your head, do you recollect the names of any cities in Lithuania from where the applicants (p. 572) came that you did interview?

A The only one that sticks in my mind is Kaunas. I'm sure there were other locations, but I don't retain the names.

Q Sir, out of all the applicants from Lithuania that you interviewed, what percentages came from Kaunas?

A If I had to estimate now, I would say half.

Q Did you ever interview any Lithuanian applicant who came from Kedainiai?

A I probably did, but I don't remember.

Q Do you recollect approximately where Kaunas was located in Lithuania?

A On the map, yes. I have never been in Lithuania, but as I recall, it is fairly centrally located in Lithuania.

Q Do you have any idea where Kedainiai is located in Lithuania?

A No.

Q Have you ever heard the name Kedainiai?

A I saw it only on this application. I may have seen it 35 years ago, but I don't remember it from then.

Q Well, Mr. Finger, if an applicant came to you while you were serving as vice-consul in Stuttgart and said,

I came from Kedainiai in Lithuania, would that raise any flags in your mind?

(p. 573) A No.

Q If the applicant came to you and said, I came from Kaunas in Lithuania, would that raise any flags in your mind?

A No.

Q Did you have occasion to pass upon the eligibility of any Lithuanians who were employed in a brush and broom factory?

A I don't recall any.

Q Well, do you recall passing upon the eligibility of any applicants who had been employed in factories in Lithuania?

A Yes, I do. I cannot name names of factories or names of applicants. That's a long time ago. But I know that I did.

Q Did it make any difference to you what kind of a factory it was where the person was employed at the time you interviewed the person?

A Yes. Certain ones were known to have been dominated by the Nazi's. Of course, the relevant question then was the capacity in which the individual was employed.

Q Sir, to your knowledge, were there any factories in Lithuania during the Nazi occupation that were not dominated by the Nazi's?

A I don't know of any. There may have been. (p. 574) Small ones, I presume, were not—I was not on the ground.

Q On what basis did you decide Nazi domination of factories?

A There were certain industries which were clearly of importance to the Nazi war effort and Nazi economy. And if they were sizable enough, it was reasonable to assume that the Nazi's controlled them.

Q Did this apply to Lithuania?

A Yes.

Q Well, what, specifically, did the Nazi's control in Lithuania that fit into this category which you have just described?

A I can't answer as precisely as I could have in 1947. But given the state of the Nazi economy, any large factory would have been under Nazi control.

Q Did you ever make any distinction as to industries?

A No. I think it was more a case of size of enterprise and the nature of the occupation of the applicant.

Q Would the manager of a brush and broom factory become ineligible under your standards?

A It would raise—any manager of any factory at the time of Nazi occupation would—it would raise some questions as to whether that person had been persecuted by (p. 575) the Nazi's.

Q You are now testifying, sir, from the information that the government supplied to you in the course of preparing you for your testimony today, are you not?

A I am testifying mainly on the process as I knew it and on certain questions that you have put to me. I did not even—did not recall from what the government lawyers had shown me that the applicant had managed a broom factory.

Q Well, if this brush and broom factory that we are using as an example consisted of 15 to 20 employees, would that employment and that enterprise render a person subject to investigation for a visa application?

MR. TENEV: Objection, your Honor. There is no testimony regarding the fact that there were 15 employees running a brush and broom factory.

THE COURT: In your case I assume you propose to introduce evidence to that effect?

MR. BERZINS: Your Honor, I propose to test the witness' credibility on this issue, is what I propose to do.

THE COURT: All right, he can pursue it. Overruled.

A As I answered earlier, the capacity in which the person was employed during a period of Nazi occupation (p. 576) would be of some significance.

I would not have denied a visa merely because someone had managed 15 employees. It would have raised some questions in my mind, and I might have made further oral inquiry about his activities.

Q Of whom would you have made that inquiry?

A First of all, of the applicant himself.

Q What if the person was the manager of a brush and broom factory that employed 100 people? Would you make any different inquiry?

A No. I would make the same inquiry. I might say that I might dig a little deeper.

Q How would you accomplish that digging, sir?

A Mainly by questioning the applicant. And if that in itself was not conclusive, I might go to other persons who knew the area and the industry in order to become better informed.

Q Where would you find these other persons, sir?

A Usually they were in a displaced persons camp where people from the same area tended to be. Also, I would inquire of the sponsoring agency, the person in charge of that agency, and indicate the nature of the information which raised a question in my mind.

Q How often did you make these inquiries?

A Rarely. It was rarely necessary. In most (p. 577) cases a determination could be made on the basis of questioning the applicant.

Q How many such inquiries did you make with respect to Lithuanians that were applicants before you?

A As far as I can recall, over this distance of time, two or three.

Q And what were the nature of those inquiries?

A Principally, to find out whether the person in charge of this sponsoring agency and other people who knew the applicant were prepared to testify that the activi-

ties of the applicant were not of a nature to be useful to the Nazi war effort. And if the applicant had claimed to be a victim of Nazi persecution, to try to dig a little deeper into the grounds for believing that, in fact, such persecution took place.

Q If the person's actual occupation was a bookkeeper, would you make any further inquiry?

MR. TENEV: Your Honor, would Mr. Berzins rephrase the question? There have been a number of questions here, if the applicant had actually been a bookkeeper, would further inquiry have been made? That seems to take into account prior questions that he has asked. He might ask a more complete question.

THE COURT: No, he's starting fresh. I'll permit the question.

(p. 578) A Answering that question in isolation is difficult. We looked at an entire application, and the fact of being a bookkeeper may or may not have been important, depending upon other statements made in the application.

Q Well, if an applicant came to you and said I was a bookkeeper in a factory that made shoes of the German military, what inquiry would you make, sir?

A Well, I would say in that case what was the nature of the persecution? What was the nature of your employment? In what respect did your employment constitute persecution?

Q What if the applicant came to you and said, I was never persecuted by the Nazi's for a single day, I worked quietly as a bookkeeper in a shoe factory in Kaunas, Lithuania? What inquiry would you make, sir?

A I would not have to make any further inquiry, since the policy was to issue visas to those who had been persecuted by the Nazi's. That statement in itself would constitute ineligibility.

Q Mr. Finger, do I understand you right, that a bookkeeper in a shoe factory that manufactured shoes for the German military would be ineligible?

A No. I don't understand why you misunderstood.

No one quarrels with the right of a bookkeeper to be a bookkeeper or to survive. That's his privilege.

(p. 579) The question at issue here is whether a person is eligible for a visa under policies where those visas are to be given to victims of Nazi persecution.

If the applicant has not proved Nazi persecution, he is, therefore, ineligible. It is not the fact that he was a bookkeeper.

Q Mr. Finger, in 1947, when you were a vice-consul, were United States visas issued solely to those persons who had been victims of Nazi persecution?

A No. As I indicated in answer to an earlier question, we also issued visas to first—first preference visas to close relatives of American citizens.

But at that time, January, 1947, those were the only two categories, either first preference visas or victims of persecution.

Q Now, can you tell by looking at the visa that was shown to you earlier, and I believe it is Exhibit A-3, what type of a visa that was?

MR. TENEV: May I show the visa to the witness?

THE COURT: Yes.

(Exhibit handed to the witness.)

A Yes. It is an immigration visa.

Q Does it list the preference?

A Pardon?

Q Does it list any preference?

(p. 580) A No, it does not, as far as I can see. It looks like a nonpreference immigration visa.

THE COURT: Does that mean he would not have been issued either because the person was a relative, or because he was a victim of Nazi persecution?

THE WITNESS: That's right. Now, in this case he would have had to be a victim of Nazi persecution because he's not a—he was not the close relative of an American citizen entitled to a first preference visa.

Q But, Mr. Finger, you can't tell that from the visa, can you? You're making this up right now, aren't you?

MR. TENEV: Your Honor, he's arguing with the witness. It's clearly indicated on the reverse side—

THE COURT: No, no, wait a minute. I'll permit the first part of your question.

MR. BERZINS: Yes, your Honor. I'll rephrase the question, if I may.

THE COURT: You cannot tell this from the visa is your question?

MR. BERZINS: Yes.

THE COURT: Can you tell it from the visa?

THE WITNESS: I do not recall exactly what a first preference visa looked like. In examining the application, I would certainly have known whether it was a first preference visa or not.

(p. 581) THE COURT: First preference was related to relatives?

THE WITNESS: Close relatives of American citizens, and the reason I made the statement that I did is that I noted that the passage was to be paid by the Catholic Committee for Refugees.

In the case of a close relative, in all likelihood, the relative would have paid the passage, though that's not proof conclusive. But at least it is a likely assumption.

THE COURT: The question is, does the visa itself show whether the person was given a visa because of a close relationship or because of Nazi persecution?

THE WITNESS: This visa does not show it.

THE COURT: Did any visa show it?

THE WITNESS: I cannot recall whether there was a difference at that time.

THE COURT: What you're saying is this was a matter of policy, but it was not reflected in the visa itself?

THE WITNESS: I just cannot be sure what—whether there was a different type of application form.

I know that the processing was different. In other words, a first—oh, as a matter of fact, I can be sure because on the front here it says, "nonpreference," and (p. 582) it is so indicated on the visa application as approved.

THE COURT: What does that mean, when it says nonpreferenced?

THE WITNESS: As I said, the two categories was the first preference visa, close relatives of American citizens. Had it been that type of visa, then there would have been a checkmark made after preference section 6A-1 or section 6A-2.

Now, since there was no check on either one, and the check, in fact, appears after the word "nonpreference," this was—

THE COURT: Where is that?

THE WITNESS: This, sir, is on the front where the photograph appears. At the top of that page it is clearly indicated that this is a nonpreference visa.

THE COURT: What does that mean in relationship to close relative or victim of persecution? Or is this a third category?

THE WITNESS: If the applicant were a close relative of an American citizen and were otherwise eligible for a visa, then he could obtain a visa without necessarily being a victim of Nazi persecution.

On the other hand, absent those conditions, absent the eligibility for first preference visa, the applicant would have to demonstrate that was a victim of (p. 583) Nazi persecution.

THE COURT: Well, is that indicated on the form?

THE WITNESS: It is not indicated on this form, but one of the other exhibits, in fact, included a statement by the applicant that he was a victim of Nazi persecution.

THE COURT: Could you get a visa if you were not a close relative and if you were not a victim of Nazi persecution?

THE WITNESS: At that time, in Germany, no.

THE COURT: Excuse me, Mr. Berzins.

Q But would this fact or this opinion that you have just testified to, cannot be so concluded from the visa itself, can it?

A No. There is no evidence on the visa itself that the applicant must have been a victim of Nazi persecution.

This policy was contained in regulations issued by the federal government under which we operated.

Q Did you review those regulations in the course of your preparation for your testimony today?

A No. I did look at them last summer.

Q Did the government furnish you a copy of those?

A I was shown them. They did not leave me a copy. But I was shown those regulations to read, yes.

(p 584) Q Did you discuss those regulations with the government's attorneys at the time?

A Briefly.

Q Do you recollect approximately when you met for the very first time with the government's attorneys?

A My recollection was February of 1982.

Q What documents were you given to review at that time?

A At that time, none. But then I had a subsequent meeting with two government attorneys in the summer of 1982 where I was shown some of the pertinent regulations and had a chance to read the regulations in their entirety.

Q Did the government attorneys also point out to you the specific portions of the regulations in which they were interested?

A Yes, they did. But I did not confine my reading to those portions.

Q Did the government attorneys show you any other documents on that occasion?

A I was shown the application for a visa and the alien registration form which are before me today. And as a recall, I was also shown the identity document issued by the Vatican representative and the statement issued by the Lithuanian group attesting that the applicant had been a (p 585) victim of Nazi persecution.

Q This latter document you have mentioned, have you seen a like or similar document before?

A Yes. I had seen them in the case of other Lithuanian applicants.

Q In this same form as this one one appeared to you?

A As far as I can recall, yes.

Q And in what language did you read them, sir?

A I read them in English.

Q Now, out of all of the Lithuanians that you had occasion to interview, how many of those Lithuanians produced a similar document, that is, the one you just mentioned, which I believe is Exhibit A-2?

A It's hard to give you an exact number after all these years. Certainly more than a dozen.

Q Well, sir, how many Lithuanian applicants had you interviewed?

A My recollection was there may have been 30 to 35 altogether.

Q So about one-third of the Lithuanian applicants you interviewed carried a similar document with them, is that true?

A Yes, as nearly as I can recall now. As I say, I cannot be exact on numbers.

Q The other document that you had an occasion to (p 586) previously review, the document from the Vatican, which I believe is Exhibit A-6—

MR. TENEV: May I show the document to the witness, your Honor?

THE COURT: Certainly.

(Exhibit handed to the witness.)

Q How many of those documents or ones similar to it have you had occasion to review while you were vice-consul at Stuttgart?

A My recollection is not many. Because many of the Lithuanian applicants did have birth certificates.

Q Well, could you estimate how many didn't?

A Ten, perhaps.

Q What did those applicants have in lieu of birth certificates?

A In many cases they had this same type of statement in lieu of birth certificate.

Q Now, have you also had occasion to review identity documents from Lithuania similar to the document we have here as Exhibit A-1?

MR. TENEV: May I show that to the witness?

THE COURT: Yes. Also give him A-3.

THE WITNESS: I think I have A-3 here.

THE COURT: All right.

(Exhibit handed to the witness.).

(p 587) THE WITNESS: Yes, I saw many of this type of identity card from Lithuanian applicants.

Q Did the Lithuanian applicants that you had occasion to interview use a similar document to A-1 in lieu of birth certificate?

A This was sometimes used. Where possible, we tried to get additional documentation.

Q How did you do the trying? What did you do?

A Well, first of all, in the instruction sheets that were issued, applicants were urged to present all possible documents that might serve in lieu of a birth certificate. Of course, the birth certificate itself would be the most important. They were given examples of the kinds of things that could be used, such as a certificate of baptism, for example. We would evaluate these in order to make the best possible judgment.

You must recall we were working in difficult circumstances where many applicants could not produce the

fully authenticated birth certificate that was desirable under the law, where sometimes police records did not go back very far.

It was, therefore, useful to us to have supplemental documents, and it became more necessary than would be usual to carry out a thorough oral interview and investigation to try to convince ourselves that the (p 588) statements being made by the applicant were true statements.

Q Mr. Finger, out of the 1500, approximately, applicants that you had occasion to interview, how many of them did not have birth certificates to present to you?

A Probably more than a thousand did not have authentic birth certificates.

Q And isn't it a fact that those people presented to you whatever they had?

A The best they could produce, yes.

Q At the time you served as vice-consul in Stuttgart, did there exist a list of ineligible organizations, people who belonged to those organizations would be deemed ineligible?

MR. TENEV: Your Honor, there is no testimony, nor is there any contention that the defendant in this case was ineligible on the basis of membership in the Siauliai organization, which is what I take it Mr. Berzins is getting to. It's not a status case, your Honor.

THE COURT: Yes. I'll overrule the objection.

A The only ones that I recall now were German organizations.

Q Do you recall the names of the other nine vice-consuls in Stuttgart at the time you served there?

A Some of them. Frank Schilling, who signed this. Roy Atherton.

(p 589) Q Do you know whether that gentleman is dead or alive?

A My understanding is that he is alive and not very well, living in California.

Roy Atherton, who is now our ambassador in Egypt. There is Cortland Rhodes, of whom I have lost track. Raid Robinson, who had come from Immigration and Naturalization Service, who I know has passed away. A man named Whitaker, also from Immigration and Naturalization Service. Del Topaski, who I think retired from foreign service and went into private business.

Some of the other names I can't remember.

Q Sir, you handled 1500 applicants, roughly, in your career there in Stuttgart. Can you give us an estimate of the number that was handled by the whole office?

A I really don't know. If you wanted a rough estimate — I'm talking about a year — if each one of the ten handled 1500, there would be 15000. But, of course, I don't know whether other people worked more slowly or more swiftly than I did.

Q What kind of support staff did you have to assist you in your work?

A We had both German secretaries and American secretaries. We had translators and interpreters.

Q When these applicants came in, they were (p 590) handled by the German staff, were they not?

A Initially, yes.

Q And the German staff actually interviewed the applicants and filled out all the forms, didn't they?

A They did not fill out the forms, no. They might translate, but the forms were invariably typed out by an American secretary.

Q The forms that were used, they were in English, were they not?

A Yes.

Q Now, the majority of the applicants, if not vast majority, were not fluent in English, is that correct?

A That's true.

Q So you did rely on interpreters to assist the applicants to fill out the form, did you not?

A Yes. But in going over the forms, I was always very careful. I spoke German. Most applicants did. It was very rare that one found an applicant who spoke neither English or German.

I made it a particular point to ask the applicants about all of the entries on the application for a visa, including name, date, place of birth, places of residence, occupation and so on, to be sure that the applicant had, in fact, supplied the information and understood what was on the form.

(p 591) Q Mr. Finger, but you, yourself, did not fill out the form, did you, that was done by others?

A Of course.

Q And you only saw the applicant when it was time for him to swear to that form, is that so, sir?

A Well, when it was time for him to be interviewed, I spent half an hour questioning the applicant. Whether or not I actually used my fingers to type a form doesn't mean much. I actually went over, orally, all of the relevant information to be sure that the applicant understood what was being asked and what answers had been given.

Q Mr. Finger, you did not spend a half hour with each applicant, did you?

A Yes.

Q Didn't you spend more time with some applicants?

A Oh, yes, of course. I mean, we are talking about an average. I might have spent 20, 25 minutes with one and 40, 45 minutes with another.

Q Weren't there also occasions when the application was so clearcut that you spent the better part of five minutes with an applicant?

A No. I don't recall a single case where I spent less than 20 minutes with an applicant, because what might (p 592) appear clearcut on paper might not necessarily be so. And, remember, operating in these conditions, where it was difficult to get authentic documents, we felt a tremendous responsibility about whom we were admitting and whom we were denying.

Consequently, I felt it was very important to go over all of the information orally, even where prima facie it looked like the applicant was eligible.

Q How many applicants a day did you handle on an average day?

A 14, 15, 16.

Q This was five days a week?

A Yes.

Q How many support staff did you have yourself?

A One secretary.

Q American?

A Yes.

Q How many German personnel?

A Well, there were none assigned to me directly. They were in a pool. And they did there work for all the vice-consuls jointly.

Q The typing of the forms, was it always done by the American secretary, or was it done also by the German secretaries?

A My recollection is in all of the cases I (p 593) handled, it was done by an American secretary.

Q In preparing for your testimony for us here today, did you write any reports to the government?

A No.

Q Did you write any letters?

A No.

Q Did you receive any letters from the government?

A Only a subpoena to appear here.

Q Have you discussed your testimony with any other vice-consuls or any other person familiar with the procedures at that time?

A No.

MR. BERZINS: Your Honor, bear with me for just a second.

THE COURT: Yes.

(Pause.)

Q Out of the 1500 applicants that you, yourself, handled, approximately what percentage did you reject?

A Perhaps eight percent.

Q These rejections, the eight percent that were rejected, what was the principal basis for the rejection?

A A judgment that the person was not truly a victim of Nazi persecution. In a couple of cases, health reasons. That had nothing to do with victimization. But (p 594) the principal reason was a finding after questioning that the person was not really a victim of Nazi persecution.

Q What was the criteria for determining who is a victim of Nazi persecution?

A Various things; one who had been confined to a concentration camp for an extended period, for example, is obviously a victim of Nazi persecution; one who had performed forced labor; one who had been imprisoned by the Nazi's for political activity. These were evidences of Nazi persecution.

Q Were these standards or procedures written down?

A They were part of the regulations, yes.

Q Do you recall which part?

A No. It's a long time.

Q Out of the regulations that the government furnished you a copy, would you pick out that portion that defines what constitutes a victim of persecution?

A They didn't leave them with me. I would have to read through the whole thing. But I have no doubt as to what those grounds were, and on the basis of which all of us operated in Stuttgart, as to what constituted victimization by the Nazi's.

Q Did you ever handle any applicants under the Displaced Persons Act?

(p 595) A No.

Q Was that done by other vice-consuls in your office?

A Yes. I have to interject here that in February of 1947 I was transferred to other work in the consulate. I then became responsible for political and economical reporting on Southwest Germany and no longer did any visa work.

Q When did you get transferred from your visa work?

A February, 1947.

Q You were there at the consulate until May of 1949, is that correct?

A That's right.

Q So in February of 1947, you actually quit doing the visa application work, is that correct, sir?

A Right.

Q So you worked on visa applications from January of '46 to February of 1947. Would that be accurate?

A Well, we didn't actually begin until the end of February. It was a total of 11 months, as I recall.

Q During that period you did not run up against any — I'll withdraw the question.

Were you familiar with an organization named the International Refugee Organization?

A Yes.

(p 596) Q Did you ever hand handle any of the paperwork that they had generated?

MR. TENEV: Your Honor, would Mr. Berzins make his question a bit specific? What does this mean, to handle paperwork generated by the International Refugee Organization? It's a bit far afield.

MR. BERZINS: I'll withdraw the question, your Honor.

THE COURT: Yes.

Q Did you, in the course of your 11 months' work as an vice-consul in Stuttgart, have occasion to review the forms and applications on behalf of applicants generated by the International Refugee Organization?

A I'm not sure of the term there. As I recall, the International Refugee Organization was the outgrowth

of UNRA, and was concerned with assisting refugees on the ground.

I don't recall that they sponsored applicants for immigration. There was an International Rescue Committee, IRC. Could that be the one?

Q Well, did the UNRA sponsor any applicants for immigration?

A No.

Q Do you recollect any other organizations that did during the period of time that you were there?

(p 597) A Oh, yes. In fact, I noticed on the application here that the Catholic Committee for Refugees was sponsoring this particular applicant. The American Joint Distribution Committee sponsored some. The International Rescue Committee sponsored some.

It was possible for these organizations to provide corporate affidavits so as to guarantee that the prospective immigrant would not become a public charge.

Q Did you have occasion to review the application of any applicant who had served in the Armed Forces allied with Germany during the Second World War?

A I don't recall a single instance, no.

Q Did you specialize in any particular applicant while you were in Stuttgart during those 11 months handling applications for visas?

A No. We all took them as they came. Varying ethnic background.

Q What was the allocation system, as you recall it, as to which vice-consul would get which applications, or was there such an allocation system?

A It was principally arithmetical. How many could you handle in a given day? Who had what kind of a work load?

That's how they were allocated.

Q Did some vice-consuls handle more applications (p 598) than others?

A It is possible. People work at different rates. I could, perhaps, handle more than those who did not speak German, because it takes time to go from one language to another. But these would not be major differences.

Q Were there any production quotas that were assigned to vice-consuls?

A No.

Q Do you remember approximately what was the rejection rate for your entire office as distinguished from yourself?

A No, I don't.

Q Between February of 1947 and up until the day the government attorneys contacted you for your testimony in this case, had you had occasion to review any visa applications?

A No.

Q And had you done any work at all in that field in those intervening years?

A No, no further visa work.

MR. BERZINS: No further questions.

THE COURT: I just have a few and then maybe Mr. Tenev has some more.

You said eight percent rejection was your average, your overall rate. Was there a pre-screening (p 599) process before the application got to the vice-consuls?

THE WITNESS: Yes, sir, there was. In a sense, an informal prescreening by the sponsoring agency. They tried not to send us cases that were obviously ineligible. Then by the local employees where someone was obviously ineligible, although they did not use much judgment there.

THE COURT: You mean local employees of the Consul?

THE WITNESS: Yes.

THE COURT: Was everyone sponsored by some organization or agency?

THE WITNESS: Sometimes there might be an individual sponsor. In the case of first preference visas, there would normally be an individual sponsor. Even with non-preference visas, if somebody had a cousin who was willing to guarantee, there could be an individual sponsor.

But the bulk of the applicants were sponsored by agencies.

THE COURT: Would you look again at exhibit A-3, what you call the cover page, which is on the back page of my certified copy?

Again, that check, nonpreference, then there is a box, then there is a preference, and two sections are cited there.

First, would you tell me what that first (p 600) section is? It is blotted out of my copy.

THE WITNESS: Section 6A-1 is the first section. And then 6A-2.

THE COURT: Do you know what 6A-1 referred to and what 6A-2 referred to?

THE WITNESS: 6A-1, as I recall, would have been husband or wife, or child, or parent of an American citizen.

THE COURT: What would 6A-2 have been?

THE WITNESS: I'm not so sure there. I think this referred to relatives of persons admitted for permanent residence in the United States.

THE COURT: Both those sections applied to close relationships?

THE WITNESS: Yes, sir.

THE COURT: So then a nonpreference would have been where there was not a close relationship, but there, at this time would have had to have been Nazi prosecution.

THE WITNESS: Yes, sir.

• • •

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF
AMERICA,

Hon. Dickinson R.
Debevoise, USDJ

Plaintiff,

Civil Action No. 81-2305

vs.

JUOZAS KUNGYS,

JUDGMENT

Defendant.

(Filed October 11, 1983)

This matter came on for trial before the Court, the Honorable Dickinson R. Debevoise, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged

That this action be dismissed on the merits, and that defendant recover of the plaintiff his costs of action.

Dated at Newark, New Jersey, this 11th day of October, 1983.

/s/ Dickinson R. Debevoise

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5884

UNITED STATES OF AMERICA, Appellant

vs.

JUOZAS KUNGYS

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 10, 1986.

/s/ Carol Los Mansmann
Circuit Judge

Dated: July 23, 1986

Office Of The Clerk

UNITED STATES COURT OF APPEALS

SALLY MRVOS
Clerk

Telephone
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July 23, 1986

Donald J. Williamson, Esq.
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Re: United States of America, Appellant vs. Juozas
Kungys

No. 83-5884

Dear Mr. Williamson:

Enclosed herewith is a conformed copy or order filed today staying the issuance of the mandate to August 10, 1986, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

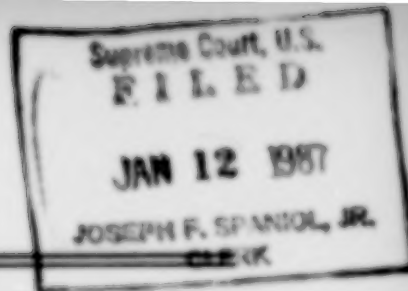
Very truly yours,

Sally Mrvos, Clerk
By: /s/ Betty J. Robinson
Deputy Clerk

Direct Dial 597-3136



No. 86-228



In The
Supreme Court of the United States
October Term, 1986

—○—
JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—○—
**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

—○—
BRIEF FOR PETITIONER
—○—

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IVARS BERZINS



QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals misconstrued the Government's heavy burden of proving the materiality of a misrepresentation by clear, unequivocal and convincing evidence, when it held that the Government, under the second prong of *Chaunt v. United States*, 364 U.S. 350 (1960), need only establish a mere "probability" that an investigation would have revealed an independent "disqualifying fact" making the petitioner ineligible for a visa had the petitioner made truthful statements as to what it held were his immaterial date and place of birth under the first prong of *Chaunt*?

2. Which, if any, of the several conflicting and divergent formulations interpreting the "second prong" of *Chaunt* governs the heavy burden of proving a "material" misrepresentation in order to denaturalize a citizen?

3. Whether the same test or tests of materiality for revoking citizenship applies at the visa application stage?

4. Whether the Third Circuit's standard of plenary review, pursuant to which it made *de novo* findings and drew inferences as to unalleged "facts" directly contrary to the findings of the District Court and to the record, on whether an investigation would have ensued and whether the petitioner was ineligible for a visa, violated Rule 52(a) of the Federal Rules of Civil Procedure and deprived the petitioner of his constitutional right to due process of law?

TABLE OF CONTENTS

	Page
Questions Presented _____	i
Table of Contents _____	ii
Table of Authorities _____	iii
Opinions Below _____	1
Jurisdiction _____	1
Statute Involved _____	1
Statement of the Case _____	1
Summary of Argument _____	6
Argument _____	9
I. The Court of Appeals erred in diluting the standard of proof for materiality in a denaturalization suit _____	9
II. The burden of proving materiality by clear, unequivocal and convincing evidence applies to misrepresentations at the visa application stage _____	20
III. The decision below violated the Fifth Amendment and Rule 52(a) of the F.R. Civ. P. and constitutes such an arbitrary threat to citizenship by the manner in which it imposed its admittedly elusive "probability" standard that this Court should exercise its power of supervision _____	28
Conclusion _____	48

TABLE OF AUTHORITIES

	Page
CASES	
<i>Berenyi v. District Director</i> , 385 U.S. 630 (1967)	25
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960)	<i>passim</i>
<i>Dunn v. United States</i> , 442 U.S. 100 (1979)	45
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981)	3, 10, 11, 12, 19, 21, 22
<i>Francis v. Franklin</i> , 105 S. Ct. 1965 (1985)	43
<i>Icicle Seafoods, Inc. v. Worthington</i> , 106 S. Ct. 1527 (1986)	8, 29, 39, 45
<i>Krasnov v. Dinan</i> , 465 F.2d 1298 (C.A. 3, 1972)	30
<i>Maikovskis v. INS</i> , 773 F.2d 435 (C.A. 2, 1985), <i>cert. denied</i> , 106 S. Ct. 2915 (1986)	11, 26
<i>Matter of G-M</i> , 7 I. & N. Dec. 40, 74 (Apr. 2, 1956)	26
<i>Matter of S- and B-C</i> , 9 I. & N. Dec. 436, 447 (Oct. 2, 1961)	26
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975)	43
<i>Pullman-Standard v. Swint</i> , 465 U.S. 273 (1982)	8, 30, 45
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979)	43
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943)	9, 20, 21, 45
<i>United States ex rel. Iorio v. Day</i> , 34 F.2d 920 (C.A. 2, 1929)	26
<i>United States v. Kairys</i> , 600 F. Supp. 1254 (N.D. Ill. 1984), <i>aff'd</i> , 782 F.2d 1374 (C.A. 7, 1986), <i>cert. denied</i> , 106 S. Ct. 2258 (1986)	10, 46
<i>United States v. Kowalchuk</i> , 773 F.2d 488 (C.A. 3, 1985), <i>cert. denied</i> , 106 S. Ct. 1188 (1986)	15, 23, 46
<i>United States v. Riela</i> , 337 F.2d 986 (C.A. 3, 1964)	4, 23, 25

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Rossi</i> , 229 F.2d 650 (C.A. 9, 1962) _____	22
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (C.A. 10, 1983) _____	11, 24
<i>United States ex rel. Teper v. Miller</i> , 87 F. Supp. 285 (S.D.N.Y. 1949) _____	25

STATUTES

8 U.S.C. § 1101(f)(6) _____	5, 23, 24
8 U.S.C. § 1182(a)(19) _____	26
8 U.S.C. § 1451(a) _____	1, 2, 5, 25
28 U.S.C. § 1254(1) _____	1
Displaced Persons Act of 1948, 50 U.S.C. App. § 1951 et seq. (1952 ed.) _____	20, 37

RULES

Federal Rules of Civil Procedure, Rule 52(a) _____	8, 28, 29
Supreme Court Rule 17.1(a) _____	29

OTHER AUTHORITIES

Constitution of the International Refugee Organization _____	33
Displaced Persons in Europe, Report No. 950, U.S. Senate Committee on the Judiciary _____	37
Federal Register, December 24, 1946, 22 C.F.R. § 61.301, Note 11 _____	32
22 C.F.R. § 61.313(a)(3) _____	16, 35, 36, 44

TABLE OF AUTHORITIES—Continued

	Page
<i>Soviet Genocide in Lithuania</i> , Pajaujis-Javis, Library of Congress, 79-84640	35
<i>Verfassungs und Verwaltungsrecht</i> , Sartorius, Carl F., Munich & Berlin, C.H. Beck (1944), Library of Congress, 46-12413 (Compilation of German Laws).	18



OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 793 F.2d 516 (C.A. 3, 1986).

The opinion of the United States District Court for the District of New Jersey (Debevoise, D.J.) is reported at 571 F. Supp. 1104 (Pet. App. C).

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court dismissing the complaint and remanding for denaturalization proceedings was entered on June 20, 1986 (Pet. App. B). The petition for a writ of certiorari was filed on August 9, 1986 and was granted on November 10, 1986. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) provides for revocation of a naturalized citizen's order and certificate of naturalization if they "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation" (Pet. App. D).

STATEMENT OF THE CASE

Respondent, through the Office of Special Investigations of the Criminal Division of the United States Depart-

ment of Justice, filed a five count Complaint in July 1981, amended in July 1982, seeking to revoke the February 1954 grant of citizenship to petitioner Juozas Kungys, a Lithuanian refugee, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended in 1961, 8 U.S.C. § 1451(a).

In Count V, "Procurement of Citizenship by Concealment of Willful Misrepresentation", respondent alleged, *inter alia*, that petitioner's misrepresentations as to his date and town of birth in Lithuania as contained in his January 1947 application for Immigration Visa and as continued in his October 1953 Petition for Naturalization constituted concealments of "material" facts and thus were grounds for denaturalization. (J.A. 18-19).

After a thirteen day bench trial, which extended over three months, the District Court dismissed all five of the counts of the Complaint, as amended, and in a lengthy opinion set forth extensive findings of fact and conclusions of law. (Pet. App. C, 39a-137a). As to the issues on which this Court granted certiorari, the District Court found that had the petitioner provided the correct information on his immigration forms that he was born on September 21, 1915 in the rural community of Reistru, Lithuania, instead of the incorrect information of being born two years earlier on October 4, 1913 in the city of Kaunas, Lithuania, his visa nevertheless would have been issued since "There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever." (Pet. App. C, 119a).

The District Court held that there was no reason not to apply the materiality test of *Chaunt v. United States*, 364 U.S. 350 (1960), governing misrepresentations in petitions

for naturalization, to misrepresentations made during the visa application stage. (Pet. App. C, 135a). The District Court then made findings under the first prong of *Chaunt* as well as to each of the formulations of the second prong of *Chaunt* as set forth in the various opinions in *Fedorenko v. United States*, 449 U.S. 490 (1981). (Pet. App. C, 135a-137a).

Under the first prong of *Chaunt* as to whether "facts were suppressed which if known, would have warranted denial of citizenship", the District Court found that "None of the suppressed facts, if known, would have warranted denial of citizenship." (Pet. App. C, 135a). The Third Circuit Court of Appeals agreed with the District Court that under the first prong of *Chaunt* the government did not establish the requisite materiality (Pet. App. A, 20a-21a), and expressly noted that:

Country of birth determined eligibility under the quota system. We note that although the defendant misrepresented his place of birth, he did not misrepresent in what country he was born. Therefore, his misrepresentation, in and of itself, did not have impact on his eligibility for a quota visa in general." (Pet. App. A, 30a).

As to whether under the second prong of materiality in *Chaunt*, "their disclosure [correct date and town of birth] might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship", the District Court found that "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation" (Brackets added, but emphasis in original text, Pet. App. C, 135a). The District Court further found that "Disclosure of these facts would not have made defendant ineligible for

a visa." (*Ibid.*) After additional analysis, the District Court concluded that petitioner's "misrepresentations and concealments would not be deemed material for Section 340(a) purposes under any of the interpretations of the second *Chaunt* test." (*Ibid.*)

The other counts of the Complaint (Counts I, II, III and IV), which were dismissed by the District Court, were predicated on the "illegal procurement" of citizenship provision added by the 1961 amendment to the Immigration and Nationality Act of 1952.¹ In dismissing Counts I and III, the District Court found that the circumstances and manner in which Soviet depositions were taken made them "unreliable" and to admit them as substantive evidence "would violate fundamental considerations of fairness." (Pet. App. C, 86a). It held that "the admissible evidence is insufficient to sustain the government's charges that defendant participated in the July and August 1941 killings in Kedainiai." (Pet. App. C, 110a). The Third Circuit left undisturbed those findings of fact and conclusions of law. (Pet. App. A, 6a).

In Count II, the government alleged that petitioner illegally procured his visa by submitting misinformation in his immigration forms as to his date and place of birth, wartime places of residence, wartime occupations and marital status. Prior to trial, the District ordered all allegations stricken, with prejudice, as to petitioner's marital status upon proof that in fact he was married on August 24,

¹ The inapplicability of the 1961 amendment to petitioner, who was naturalized in 1954, was never reached because the District Court concluded that the materiality requirement embodied in "illegal procurement" overlapped the dismissal ground of "material misrepresentation." (Pet. App. C, 124a) (See *United States v. Riela*, 337 F.2d 986, 989 (C.A. 3, 1964)).

1943 to Sofia Anuskeviciute in Kaunas, Lithuania. (Order of January 31, 1983, docket entry 112, J.A. 1). After trial, the District Court found that residence in Kedainiai and being a bookkeeper in a brush and broom shop would not have made petitioner ineligible for a visa. (Pet. App. C, 135a). The Third Circuit confirmed the District Court's findings and conclusions as to the lack of materiality of petitioner's omissions concerning occupations and residences, in holding that "... they do not pass the *Chaunt* materiality test." (Pet. App. A, 33a).

Both the District Court and the Third Circuit rejected the government's argument contained in Count IV that giving any false testimony, irrespective of materiality, is grounds for denaturalization under 8 U.S.C. § 1451(a) for lack of "good moral character" under 8 U.S.C. § 1101(f) (6). The Third Circuit correctly distinguished the naturalization process from that of denaturalization in holding that "We reject the proposition that the government can avoid the *Chaunt* materiality test by alleging illegal procurement in connection with section 1101(f)(6)." (Pet. App. A, 25a).

The Third Circuit, notwithstanding its confirming the District Court's findings and conclusions that the government did not establish the requisite materiality under the first prong of *Chaunt*, felt compelled to "consider the second prong in the *Chaunt* test and articulate our view of this elusive concept while remaining cognizant of its various interpretations." (Pet. App. A, 20a-21a). The Third Circuit then made a *de novo* finding, directly contrary to the express finding of the District Court (Pet. App. C, 135a), that, had petitioner made truthful statements as to his date and place of birth, an investigation "would have ensued." (Pet. App. A, 32a).

Proceeding from the false premise that only victims of Nazi persecution were eligible for non-preference quota immigration visas, the Third Circuit made the *de novo* finding that the obtaining by petitioner of a residency permit (transmitted to the Mayor with a form letter indicating it was "without special conditions or restrictions") in a rural community in southern Germany a few months before the Allies occupied the area would "tend" to show that the petitioner was not a victim of Nazi persecution. (Pet. App. A, 33a). The District Court had found that a former Vice Consul who testified that the Nazi persecutee requirement was contained in the regulations was in error and the government was unable to produce the non-existent regulation. (Pet. App. C, 119a-120a n.7, and Lodging, B. 1298).

The Third Circuit adopted a "probability" standard as to what an investigation under the second prong of *Chavez* had to show and made the *de novo* findings that had an investigation been made by petitioner's naturalization examiner (who noted his waiver on the petition) "such investigation probably would have resulted in a denial of the petition since it would have tended to prove his ineligibility for a visa in the first instance." (Pet. App. A, 36a-37a).

On June 20, 1986, the Third Circuit entered a judgment reversing the judgment of the District Court and remanding for denaturalization proceedings (Pet. App. A, 30a), which it stayed on July 23, 1986 pending final disposition by this Court. (J.A. 235-236).

SUMMARY OF ARGUMENT

A misstated date and town of birth in an application for a quota immigration visa and in a petition for natural-

ization are not "material" within the meaning and intent of the denaturalization provision of § 340 of the Immigration and Nationality Act of 1952, as amended, since the visa was issued in accordance with federal regulations on the basis of the petitioner's country of birth which determined his eligibility under the quota system. Having been born two years later, and in a rural community in Lithuania instead of a city in Lithuania, would not have had any effect whatsoever on the issuance of an immigration visa under the quota for Lithuania, (Pet. App. C, 119a). As the District Court found, "Disclosure of these facts would not have made the defendant ineligible for a visa." (Pet. App. C, 135a).

There was no visa eligibility requirement, preference or priority, under the regulations then in effect or in the President's directive of December 22, 1945 that a displaced person or refugee *also* had to be a victim of Nazi persecution. Irrespective of whether petitioner was or was not a victim of Nazi persecution, he was still eligible for a non-preference immigration visa under the quota for Lithuania since, as the District Court expressly found (and the Court of Appeals confirmed), he was a Lithuanian displaced person who fled from the Russian Front. (Pet. App. C, 115a-116a; Pet. App. A, 7a). As the District Court further found, the uncorroborated testimony of a former Vice Consul that only Nazi persecutees were eligible for non-preference quota visas was in error.

Obtaining a residence permit, as a refugee, from rural, civil authorities in Germany a few months before the Allied Forces liberated the area was neutral conduct which could not support a tendential inference that petitioner was not a victim of Nazi persecution. The drawing of such an unwar-

ranted factual inference by the Court of Appeals was an improper *de novo* finding contrary to Rule 52(a) of the Federal Rules of Civil Procedure and the Supreme Court's holdings in *Pullman-Standard v. Swint*, 465 U.S. 273 (1982) and *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986). Moreover, the obtaining of such a residency permit was not only irrelevant and immaterial, but even as to the bogus Nazi persecutee visa requirement could not negate the District Court's finding that there was independent support for the fact that petitioner was active in the anti-Nazi resistance movement in Lithuania during the Nazi occupation and thereby subjected himself to the risk of being persecuted by the Nazis for high treason. As the District Court found, the Government did not meet its burden of disproving that the petitioner was a member of the anti-Nazi resistance movement in Lithuania as represented on the Lithuania Ex Political Prisoner's Committee Certificate (Pet. App. C, 119a-120a n.7).

Both the District Court and the Court of Appeals were correct in concluding that misstated date and place of birth in immigration papers did not, in and of themselves, demonstrate a lack of moral character and were not material under the first prong of *Chaunt v. United States*, 364 U.S. 350 (1960) since the suppressed, correct date and place of birth were not facts "which, if known, would have warranted denial of citizenship."

The record below supports the District Court's finding that no investigation would have occurred had the petitioner set forth his correct date and place of birth in his immigration papers. The Court of Appeals *de novo* finding to the contrary violates Rule 52(a) of the Federal Rules of Civil Procedure, is contrary to this Court's holdings in *Pullman-Standard v. Swint*, *supra* and *Icicle Seafoods, Inc.*

v. Worthington, supra, and would constitute a denial of due process to the defendant.

As the District Court correctly concluded, under that formulation of the second prong of *Chaunt* which is consistent with the long established burden on the Government to prove every element of a denaturalization case with clear, convincing and unequivocal evidence which does not leave any issue in doubt, as set forth in *Schneiderman v. U.S.*, 320 U.S. 118 (1943), the Government failed to meet its burden that such an investigation, if conducted, would have uncovered facts justifying denial of citizenship. The Court of Appeals erred in diluting the Government's burden of proof and then finding based on a "probability" standard that obtaining a residency permit "tended" to support the unwarranted inference that petitioner was not a victim of Nazi persecution. The Court of Appeals erred in hypothesizing that the absence of being a victim of Nazi persecution was a disqualifying fact making petitioner ineligible for a visa. No such disqualification existed since displaced persons who fled from the Russian Front were as eligible for quota visas as were victims of Nazi persecution. Thus, there were no underlying facts (disclosed or undisclosed) that would now justify the denaturalization of petitioner.

ARGUMENT

I

The Court of Appeals Erred in Diluting The Standard of Proof For Materiality In A Denaturalization Suit

Each denaturalization case since this Court's 1943 decision in *Schneiderman v. United States*, 320 U.S. 118, 123

has held that the Government bears the heavy burden in such cases of proving each issue by clear, unequivocal and convincing evidence which does not leave such issue in doubt. Indeed, this Court as recently as *Fedorenko v. United States*, 449 U.S. 490, 505-506 (1981) stated, "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." Consistent with that exacting standard of proof, lower courts have applied a "certainty" test to the issue of the "materiality" of concealed facts or misrepresentations in applications for visas or petitions for naturalization under the first prong of *Chauvet v. United States*, 364 U.S. 350, 355 (1960), i.e. whether "facts were suppressed which if known, would have warranted denial of citizenship." See *United States v. Kairys*, 600 F. Supp. 1254, 1267, *aff'd* on other grounds, 782 F.2d 1374 (C.A. 7, 1986).

The District Court herein expressly found that, "None of the suppressed facts, if known, would have warranted denial of citizenship." (Pet. App. C, 135a). The Court of Appeals agreed with the District Court that the government did not establish the requisite materiality of any concealed or misrepresented fact under the first prong of *Chauvet*. (Pet. App. A, 20a-21a).

The Third Circuit, however, felt compelled to examine the additional language in *Chauvet* as to whether, "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship (the so-called "second prong"). Although the Third Circuit acknowledged that "there is some opinion that the second prong may not contain a standard separate from the first" (Pet. App. A, 21a), it adopted a diluted standard of proof for materiality in holding that

“where the government is able to prove that such investigation *probably* would have led to the discovery of disqualifying facts, then the materiality test under the second prong of *Chaunt* is satisfied.” (Pet. App. A, 22a, emphasis in original).

In adopting its “probability” standard of proof based on the Second Circuit’s standard in an alien deportation case, *Maikovskis v. INS*, 773 F.2d 435 (C.A. 2, 1985), the Third Circuit noted that the Tenth Circuit in a denaturalization case, *United States v. Sheshtawy*, 714 F.2d 1038 (C.A. 10, 1983) adopted Justice Blackmun’s interpretation of *Chaunt* as explicated in his concurring opinion in *Fedorenko*. (Pet. App. A, 18a-19a).

Justice Blackmun, in *Fedorenko*, pointed out that the minimal test of the materiality of a misrepresentation set forth in the majority opinion (“if disclosure of the true facts would have made the applicant ineligible for a visa”), is equivalent to the first prong of *Chaunt* (“facts were suppressed which if known, would have warranted denial of citizenship”). 449 U.S. at 520. He expressly rejected the Fifth Circuit’s “possibility” test in *Fedorenko* on the grounds that it would have “diluted materiality.” He concurred with the plurality opinion in *Fedorenko* on the grounds it also adhered to the more rigorous standard of proof since the government had demonstrated the actual existence of the disqualifying fact that Fedorenko had been a concentration camp guard and did not reach its conclusion on the basis of the immaterial false statements as to his place of birth.

- In *Fedorenko*, Justice Blackmun would have had this Court eliminate the confusion as to whether *Chaunt* created

more than one standard of proving materiality in a denaturalization case either at the visa or petition stage and set forth his reasoning:

Chaunt, to be sure, did announce a disjunctive approach to the inquiry into materiality, but several factors support the conclusion that under either "test" the Government's task is the same; it must prove the existence of disqualifying facts, not simply facts that might lead to hypothetical disqualifying facts.

... I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its "two tests" are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of *Chaunt* is consistent with the actual language of the so-called second test; it also appears to be the meaning that the dissent in *Chaunt* believed the Court to have intended. 449 U.S. at 523-526.

In his dissent in *Fedorenko*, Justice Stevens also pointed out that the proper analysis of the *Chaunt* test of materiality should focus on whether a disqualifying fact actually existed with little or no weight attached on the basis of speculation about what might have been discovered if an investigation had been initiated. 449 U.S. at 537.

Although Justice White in his dissenting opinion in *Fedorenko* would shift the burden to the defendant on rebuttal, he too recognized that the ultimate determination hinged on whether there was proof of underlying facts which would or would not have justified denial of citizenship. 449 U.S. at 538 n.8.

The District Court herein evaluated *Chaunt* and *Fedorenko* in combination and held, "I have concluded that defendant's concealments and misrepresentations both singly and in the aggregate do not meet the requirements

of materiality under any of the formulations set forth above." (Pet. App. C, 135a).

In grappling with what it characterized as the "elusive" second prong of *Chaunt*, the Third Circuit was confronted with what should have been the dispositive finding by the District Court that, "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (Pet. App. C, 136a, emphasis in original). Indeed, the petition for naturalization contains the notation "Investigation Waived" (J.A., 50). The naturalization examiner testified that he made that notation on the petition, "If he felt that an investigation would be a waste of time and money, that there would be no reason to believe that a field investigation would produce anything worthwhile or of any significance." (J.A., 153), and "Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible." (J.A., 164). A former Vice Consul who testified for the government admitted that out of the 1,500 visa applications he processed (J.A., 222), approximately 1,000 did not have authentic birth certificates, and as to the Lithuanian applicants, he may have made 2 or 3 inquiries. (J.A., 212). Nevertheless, the Third Circuit made a *de novo* finding that it was "unrebutted" that an investigation would have been conducted because of discrepancies between petitioner's actual date and place of birth and submitted documents. (Pet. App. A, 21a-22a).

The Third Circuit begs the issue in inferring that the discrepancies between the true date and place of birth and the submitted documents would have triggered an investigation. The test is not discrepancies but whether the disclosure of petitioner's true date and place of birth would

have been so significant as to cause an investigation as to whether he was ineligible for a visa. If the petitioner had set forth his correct date and place of birth on his visa application, there would have been no discrepancies since he would obviously have submitted consistent supporting documents.

No investigation was needed for a Vice Consul to determine whether petitioner was registered as a foreign resident with German civil authorities before the Allied occupation since petitioner disclosed on his visa application his residence in Poltringen, Germany from October 1944 to July 1945. (J.A., 30). Indeed, such residence in Germany before December 22, 1945 by a Lithuanian refugee from the Russian front established that he was a "displaced person" covered by the President's Directive of December 22, 1945 (Pet. App. F), and thus eligible for a priority in the issuance of a non-preference quota immigration visa under the published federal regulations (Pet. App. E, 140a-142a).

There is nothing in the record to indicate what police records were examined by Vice Consul Frank Schilling who actually processed petitioner and his wife's visa application, other than the notation "Police dossier available." (J.A., 33). The only residence permit produced by the government from their immigration files is the one obtained by Mrs. Kungys from the Provincial Council of Tuebingen (the District in which the Community of Poltringen is located) on February 13, 1945 (Pet. App. H, 159a). Obtaining such an innocuous permit from German civil authorities prior to the Allied occupation clearly did not make her ineligible for her immigration visa or trigger off an investigation that obtaining such a permit "tended" to show that she was not a Nazi persecutee.

The Register of Residents of Ammerbach (the municipality for the Community of Poltringen in Tuebingen District) contains the initial registration for the petitioner and his family on November 16, 1944. (J.A., 53-56). That document incorrectly records petitioner's date of birth initially as September 21, 1908, crossed out and replaced with the also incorrect date of October 4, 1913 and the incorrect place of birth as Kaunas. That document is replete with errors since it also places Kaunas in the wrong county of Taurage; contains the incorrect date and place of birth of Mrs. Sofia Kungys; contains birth dates of two of Mr. Kungys' brothers (Felix and Stanislaus) which would have them born within five months of each other; and the incorrect date of birth of Youzas Koncius, a fellow student of Mr. Kungys's brother. (J.A. 53, Lodging, R. 1219)² In apparent recognition by our Consulates of widespread errors contained in end of the war German civil records, none of those obvious discrepancies triggered off an investigation or prevented Mrs. Kungys, petitioner's brothers or Youzas Koncius from obtaining visas. (Amicus App. C, 32a).

A more realistic assessment of conditions in Germany at the time was made by former Chief Judge Aldisert in his dissenting opinion in *United States v. Kowalchuk*, 773 F.2d 488 (C.A. 3, 1985), *cert. denied*, 106 S. Ct. 1188 (1986) in noting that, "In Germany, the state had ceased to exist. A mass of civilians, freed persons and the first waves of 13

² In the Third Circuit's flawed review of the record, it erroneously found that petitioner provided the Third Reich with his correct date and place of birth. The Register in fact contains the same false place of birth of Kaunas and false October 4, 1913 date of birth as his internal Lithuanian passport (J.A. 53, 56).

million refugees from Eastern Europe wandered the country." 773 F.2d at 500.

Notwithstanding the absence of any allegation in the Complaint or statutorily required government affidavit of good cause that petitioner misrepresented he was a Nazi persecutee or that obtaining a residency permit from the Third Reich negated eligibility for a quota immigration visa, the Third Circuit hypothesized that only victims of Nazi persecution were eligible for quota immigration visas and that the transmittal of a residency permit from one German civil authority to another in a printed form letter that indicated the permit was "without special conditions and restrictions" (J.A., 58-60) would call in to question petitioner's claim he was a victim of Nazi persecution. (Pet. App. A, 37a). In applying its "probability" standard, the Third Circuit proceeded from the false premise that the absence of being a Nazi persecutee was a "material" disqualifying fact under the second prong of *Chaunt*, by disregarding:

(a) The actual published regulation then in effect giving a first priority for non-preference quota immigration visas to "displaced persons" covered by President Truman's Directive of December 22, 1945 (Federal Register, 22 C.F.R. § 61.313(a)(3), Pet. App. E, 140a);

(b) The President's Directive of December 22, 1945 which directed the government "to facilitate full immigration to the United States under existing quota laws", and that "Visas should be distributed fairly among persons of all faiths, creeds and nationalities." (Pet. App. F, 148a-149a);

(c) The District Court's finding that the evidence showed that a former Vice Consul, who testified that the

requirement that quota visas be issued only to victims of Nazi persecution was in error on this point (Pet. App. C, 119a-120a n.7);

(d) The District Court's finding that the government did not prove that petitioner's claim that he participated in the anti-Nazi resistance movement in Lithuania (and was thus subject to persecution for high treason) was false (Pet. App. C, 120a n.7);

(e) The absence of any allegation in the Complaint or the statutorily required Affidavit of Good Cause as to any Nazi persecutee visa requirement or any such misrepresentation by petitioner; and

(f) The inability of the government to produce at trial or on appeal any regulation which granted non-preference quota immigration visas only to victims of Nazi persecution and which excluded refugees from the Russian front. (Lodging, R. 1298).

The Third Circuit engaged in that tour de force in apparent ignorance of both United States' non-preference quota immigration regulations (Pet. App. A, 33a n.10) as well as the German laws and regulations (before, during and after World War Two) which continuously required the registration of all residents, including foreigners.

Under the Third Reich, "Every foreigner over 15 years old, who wants to remain in the territory of the Reich longer than 48 hours, needs a special residence permit." Section 2.(1), Reichsgesetzblatt S. 1667, ber. S 1750. All persons, citizens as well as foreigners, must still register in Germany as set forth in Melderechtsrahmengesetz, 16 August 1980, Bundesgesetzblatt I 1429. Section 7 of the present German law on residency permits for foreigners,

Auslandergesetz, 28 April 1965, Bundesgesetzblatt I 353, contains the identical language as Section 3. (3) of 126c from the German law and regulations in effect during the Third Reich, Reichsgesetzblatt I S.1058 ber. S 1067. of August 22, 1938, to wit:

§ 3. (1) The residence permit (§ 2) is good for the territory of the Reich, when it is not restricted to certain parts of the territory of the Reich;

(2) The residence permit can be granted for a definite or indefinite time period;

(3) The residence permit can provide for conditions and requirements; and

(4) After the residence permit has been issued, it can be restricted in area and time, as well as provide for additional conditions and requirements. (Translated from the compilation of German laws as of April 1, 1944 by Dr. Carl Sartorius, Professor at the University of Tuebingen, a standard text found in law libraries in the United States, *Verfassungs und Verwaltungsrecht*, Dr. Carl Sartorius, Munich and Berlin, C. H. Beck, 1944, Library of Congress 46-12413; 349.43G37V).

Neither petitioner nor his wife received residency permits unrestricted as to the territory of the Reich or for an indefinite time period. Both petitioner's (J.A. 58-60) and his wife's (Pet. App. H, 159a) permits were restricted to the area of Wuerttemberg and Hohenzollern and both permits expired on February 1, 1947. Although no "special" conditions were imposed, additional conditions and requirements could have been imposed even after the permits were issued. The only reasonable inference that could be drawn from this innocuous conduct, is that the petitioner and his

wife complied with the bureaucratic requirements imposed on refugees as well as citizens of the Third Reich. Such conduct can hardly have any relevance or tendency to show ineligibility for a visa, let alone have any relationship to a non-existent requirement of being victims of Nazi persecution.

Moreover, even as to the straw man issue of the bogus Nazi persecutee visa eligibility requirement, the Third Circuit ignored the District Court's finding, based on testimony in the record it found credible, that the government had not disproved petitioner's claim that he was a participant in the anti-Nazi resistance in Lithuania and his arranging the escape of nine people from the Nazi S D during flight from the Russian Front and thus subjected himself to persecution for high treason. (Pet. App C, 119a-120a n.7) (See Lodging containing testimony of V. Vidiekunas, R. 916-918; Youzas Koncius, R. 1202-1216; Sofia Kungys, R. 1060-1070. See also District Court reference to supporting deposition of W. Janson, Pet. App. C, 114a).

Although denominated a "probability" test based on the second prong of *Chaunt*, the Third Circuit's diluted standard of proof was satisfied by sheer speculation, hypothesized tendencies and a bogus eligibility requirement for a quota immigration visa.

It is respectfully submitted that this case demonstrates that the possibility test and the probability test for materiality substitute speculation for proof and lead to the "hypothesized disqualifying facts," Justice Blackmun warned against in *Fedorenko*. Thus although denominated a "probability" test, the Third Circuit opinion severely dilutes the longstanding standard of proof required of the Government before it can deprive a naturalized citizen of

his "precious right." It would appear that only the certainty test is consistent with the *Schneiderman* standard of the heavy burden that the Government be required to prove its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This is especially important since denaturalization cases are non-jury trials and in many recent cases the judges are subject to the "hydraulic pressure" of trying what are tantamount to war crimes' cases, as to which United States courts would not otherwise have jurisdiction.³ Under the circumstances, the Government's burden of proof of materiality in a denaturalization case should not be diluted to less than that required of a simple tort case.

II.

The Burden of Proving Materiality By Clear, Unequivocal and Convincing Evidence Applies To Misrepresentations At The Visa Application Stage.

Petitioner's application for a visa (J.A. 30) contains the same incorrect date and town of birth as found in his petition for naturalization (J.A. 48). If the government is required to prove that a misrepresented date and place of birth in a petition for naturalization are material in order to denaturalize under Section 340(a) of the Immigration and Nationality Act, there appears to be no sound reason why the government should not also be required to prove that a misrepresented date and place of birth in a visa application are material in order to denaturalize under the same statute. Section 340(a) makes no distinc-

³ The District Court denied petitioner's motion to dismiss for lack of jurisdiction over war crimes under the "territoriality" clause of the Sixth Amendment to the Constitution. See Appellee's Brief to Third Circuit p.1. The Third Circuit opinion did not consider that issue raised by petitioner.

tion between stages and does not confine the materiality of a misrepresentation to the petition for naturalization stage. Instead it sets forth the requirement for materiality in order to denaturalize, presumably at whatever stage of the naturalization process the putative misrepresentation or concealment occurs. It seems equally sound to require that the standard for proving the materiality of the misrepresentation be the same clear, unequivocal and convincing evidence which does not leave the issue in doubt test as required by this Court to denaturalize since *Schneiderman*.

In *Fedorenko v. United States*, 449 U.S. 490 (1981), the government sought to revoke his citizenship both on the grounds of illegal procurement and of concealment and misrepresentation because he failed to disclose in his application for a visa that he had served as an armed guard at a Nazi concentration camp. Under Section 10 of the Displaced Persons Act, 62 Stat. 1013, 50 U.S.C. App. § 1959 (1951), "any person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Fedorenko also misrepresented his place of birth. But, as the Court's majority opinion reasoned, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material' facts." 449 U.S. at 507.

Justice Marshall, writing for the majority, then went on to state, "[T]he misrepresentation that raises the materiality issue in this case was contained in petitioner's application for a visa. . . . It is, of course, clear that the materiality of a false statement in a visa application must

be measured in terms of its effect on the applicant's admissibility into this Country. See United States v. Rossi, 299 F.2d 650, 652 (C.A. 9, 1962)." 490 U.S. at 509. [Emphasis added].

As the District Court herein noted, "As to the visa application stage the Court held '[a]t the very least a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa.' 449 U.S. at 509." (Pet. App. C, 128a). That language in *Fedorenko* directly parallels the first prong of *Chaunt* of proving "materiality" by "clear, unequivocal, and convincing evidence . . . that facts were suppressed which, if known, would have warranted denial of citizenship." 364 U.S. at 355.

As the District Court herein further noted:

Justice Blackmun, concurring, failed "to see any relevant limitation in the *Chaunt* decision or the governing statute that bars *Chaunt's* application to this case. By its terms, the denaturalization statute at the time of *Chaunt*, as now, was not restricted to any single stage of the citizenship process. Although in *Chaunt* the nondisclosure arose in response to a question on a citizenship application form filed some years after the applicant first arrived in this country, nothing in the language or import of the opinion suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country. If such a distinction was intended, it has eluded the several courts that unquestionably, have applied *Chaunt's* materiality standard when reviewing alleged distortions in the visa request process. 449 U.S. at 519." (Pet. App. C, 129a).

Further in his concurring opinion in *Fedorenko*, Justice Blackmun rejected the Fifth Circuit's "possibility"

test at the visa application stage since it “would have diluted materiality.” 449 U.S. at 523. His reasoning is as equally applicable to the so-called “probability” test in the instant case in observing that, “If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion.” 449 U.S. at 526 (emphasis in original).

Indeed, as stated by former Chief Judge Aldisert in his dissenting opinion in *United States v. Kowalchuk*,

“The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word ‘might’, as contained in *Chaunt*, then one word will wipe out an entire galaxy of settled case law.” 773 F.2d 488, 515 (C.A. 3, 1985).

He concluded that the Third Circuit was bound by the “certainty” test for proving materiality at the visa stage as previously held by the Third Circuit in *United States v. Riela*, 337 F.2d 986, 989 (C.A. 3, 1964) in stating, “We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken, but that it would have uncovered facts warranting visa denial.” 773 F.2d at 515.

The government took the extreme position below that Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6) which provides that “No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is or was . . . (6)

one who has given false testimony for the purpose of obtaining any benefits under this Act," reaches any false statement at the visa application stage irrespective of materiality. (See Paragraph 49, Count IV of Amended Complaint, J.A. 17-18).

But the District Court herein held that the "illegal procurement" grounds for revoking citizenship alleged by the government (Counts II and IV) overlapped the misrepresentation grounds (Count V) and both were governed by the materiality test. (Pet. App. C, 123a). The Third Circuit herein agreed with the District Court and correctly adopted the view of the Tenth Circuit in *Sheshtawy* that the materiality test applies to the false testimony provisions of "illegal procurement" under § 1101(f)(6) stating: "We reject the proposition that the government can avoid the *Chaunt* materiality test by alleging illegal procurement in connection with section 1101(f)(6)". (Pet. App. A, 25a). Moreover, the misrepresentation as to petitioner's date and town of birth were not made for the purposes of "obtaining any benefits" under the immigration laws not otherwise available to him, since he was eligible for an immigration visa under the quota for Lithuania no matter on what date or in what city or town in Lithuania he was born.

In view of the requirement of proving materiality irrespective of whether the government proceeded on either the "illegal procurement" or "misrepresentation"

grounds under Section 340(a), as amended in 1961, the Court of Appeals did not reach the petitioner's contention that under *United States v. Riela*, 337 F.2d at 989, his denaturalization has to be governed by the laws in effect at the time of his naturalization and "illegal procurement" was not part of the immigration laws at that time. Indeed, his petition for naturalization made no reference to "illegal procurement" as a ground for revocation of citizenship. "Illegal procurement" was intentionally deleted as a ground for denaturalization when the McCarran-Walters Act was enacted in 1952 and was not reinstated as a ground for denaturalization under § 1451(a) until it was amended by the Act of September 26, 1961 (75 Stat. 650, 656).

At the trial the Government presented Seymour Finger, a former Vice Consul, who testified that a quota visa would routinely be denied as of February 1947 to an applicant who lied to a Vice Consul concerning his date and place of birth (J.A. 200). The testimony is unclear as to whether the witness meant to encompass in "place" of birth the material fact of country of birth which determined eligibility under a quota or the immaterial fact of the town or city of birth. In any event that testimony is not a basis for denaturalization which is distinguishable from the naturalization process, including at the visa application stage. *Berenyi v. District Director*, 385 U.S. 630, 636-637 (1967). Even as to the lesser status of being an alien, the issue is not whether a consul could have refused a visa but whether a *proper* refusal could have been made. At that time in order to justify refusal of a visa or exclusion upon entry, a suppressed fact had to be material which meant the fact suppressed had to have been a ground of exclusion under the law. *United States ex rel. Teper v. Miller*, 87 F. Supp. 285 (S.D.N.Y. 1949).

Indeed, the rule applied by the Attorney General as of 1956 was that "a misrepresentation is not material, when made during proceedings for admission into the United States, if the alien would not have been denied a visa or excluded had he told the truth." *Matter of G-M*, 7 I. & N. Dec. 40, 74 (Apr. 2, 1956). One of the leading authorities relied upon by the Attorney General was *United States ex rel. Iorio v. Day*, 34 F.2d 920 (C.A. 2, 1929). There the Second Circuit rejected the attempt to deport an alien who allegedly procured his visa by fraud by swearing he had never been imprisoned, and stated:

"It is true that the relator was bound to tell the truth on his application, but if what he suppressed was irrelevant to his admission, the mere suppression would not debar him. . . So the first question comes down at most to whether the facts, had he disclosed them, would have been enough to justify the refusal of a visa or exclusion upon entry." 34 F.2d at 921.

At the time petitioner entered the United States in 1948, this view of the Second Circuit concerning the excludability of entry due to material misrepresentation had not yet been embodied in a statute. It originally appeared in Section 10 of the DPA and was codified in the Immigration and Nationality Act of 1952. 8 U.S.C. § 1182(a)(19).

The "probability" test of the Second Circuit in *Maikovskis v. INS*, 773 F.2d 435 (C.A. 2, 1985), *cert. denied*, 106 S. Ct. 2915 (1986) to determine materiality in a deportation proceeding against an alien endorsed the applicability of *Chaunt* to misrepresentations in visa documents, as have "all of the Courts of Appeals that have considered the issue". 773 F.2d at 441. In its brief to the Second Circuit, the government agreed that "all of the Courts of Appeals that have considered the issue deem the *Chaunt* test applicable to misrepresentations in visa documents",

but argued that the second prong should be the second prong of the Attorney General's opinion in *Matter of S- and B-C*, 9 I. & N. Dec. 436, 447 (Oct. 2, 1961) that "A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." The Third Circuit herein in following the Second Circuit in *Mai-kovskis* has adopted a diluted standard of proof at best applicable to aliens in a deportation proceeding which is not governed by Section 340(a), the denaturalization provision of the Immigration and Nationality Act.

In any event, the petitioner's misrepresentations as to his date and place of birth did not "shut off a line of inquiry" leading to his obtaining a residence permit "without special conditions" in the Third Reich since his visa application correctly disclosed residence in Poltringen under the German Reich. Moreover, as demonstrated *supra*, that "line of inquiry" was not relevant to his eligibility for a visa or the non-existent Nazi persecutee requirement. As the Attorney General opined more than a "remote, tenuous, or fanciful connection" between the misrepresentation and the investigation is required. 9 I. & N. Dec. at 448-49.

Whatever speculation former Vice Consul Finger engaged in as to whether he would have granted a visa to petitioner had he handled the application is not relevant for denaturalization purposes since vice consuls lose jurisdiction once an alien is naturalized. It is clear that the District Court was correct that no naturalization examiner would have conducted an investigation into the validity

of a visa issuance based on disclosure of discrepancies in date and place of birth. Former naturalization examiner Julius Goldberg testified on cross-examination that " . . . in my capacity as a naturalization examiner, if I obtained information that a person had given false information in previous applications as to his date and place of birth, I've had many, many, many such cases where people told me that the information contained in the visa was not true, that they obtained their visa using other identities, other documents." (J.A. 172) As to many of those cases he further testified that there was an avenue of relief under Section 241(f) of the Immigration and Nationality Act before an immigration officer and that "If they had the necessary period of residence and physical presence after that date, they could apply for naturalization, and generally there would be no further problem." (J.A. 173-174). If an incorrect date and place of birth were correctable misstatements in the pre-naturalization process, it would be unsound to transubstantiate them into "disqualifying facts" for denaturalization.

There appears to be no sound reason why there should be a different and diluted standard of proof in viewing misrepresentations at the visa stage where the statutory authority under which the government seeks to denaturalize is contained in a statute which requires materiality.

III.

The Decision Below Violated the Fifth Amendment and Rule 52(a) of the F.R. Civ.P. and Constitutes Such An Arbitrary Threat to Citizenship By the Manner in Which It Imposed Its Admittedly Elusive "Probability" Standard That This Court Should Exercise Its Power of Supervision.

In addition to adopting a diluted test for "materiality," the Third Circuit herein applied its "probability"

test in a manner which “so far departed from the accepted and usual course of proceedings” as to “call for an exercise of this Court’s power of supervision.” [Sup.Ct.R.17.1 (a)]. After giving proper deference to the District Court’s findings that an incorrect date and place of birth on an application for an immigration quota visa based on a correct country of origin were not “material” under the first prong of *Chaunt* (Pet. App. A, 20a), the Third Circuit made its own finding that it was “unrebutted” that discrepancies between the true facts as to his date and place of birth and submitted documents would have resulted in an investigation (Pet. App. A, 21a-22a). In doing so, the Third Circuit ignored the District Court’s express finding that “The government’s own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation.” (Pet. App. C, 136a), (emphasis in original).

Under Rule 52(a) of the Federal Rules of Civil Procedure and under this Court’s holding in *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986) decided just two months prior, the Third Circuit was bound by the District Court’s finding that no investigation would have resulted unless that finding was “clearly erroneous” and in no event should have made findings of its own. Indeed, the Third Circuit acknowledged that, “Insofar as our review involves findings of fact made by the district court after a non-jury trial, our review is limited to the clearly erroneous standard.” (Pet. App. A, 3a). The Third Circuit then erroneously proceeded to give plenary review to the factual elements of (a) whether an investigation would have ensued; and (b) whether, under its test, such an investigation “probably” would have discovered a hypothesized “disqualifying fact” of not being a “victim of

Nazi persecution," separate and apart from the otherwise immaterial facts of his incorrect date and place of birth.

While the "ultimate" fact of "materiality" may be a mixed question of law and fact that requires the application of legal principles to the historical facts of a case, the factual component of whether *an investigation would have ensued* as bearing on the ultimate fact (materiality) is subject to review only under the clearly erroneous rule. *Pullman-Standard v. Swint*, 446 U.S. 273, 286-287 n.16 (1982). The Third Circuit had previously been clear as to the standard of review as to ultimate facts, stating, "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (C.A. 3, 1972). Here the District Court reviewed the evidence, including the testimony of a former INS naturalization hearing examiner and a former Vice Consul presented by the Government, and made the subsidiary finding that "Certainly there was nothing which would excite suspicion in the fact that defendant was born in Reistru in the year 1915." (Pet. App. C, 136a).

Indeed, the notation "Investigation Waived" was made on petitioner's Petition for Naturalization (J.A. 50) because as the then INS examiner explained a field investigation would be routinely waived, "Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible." (J.A. 164). It is the Third Circuit's finding that an investigation by the naturalization examiner would have en-

sued and "would have tended to prove his ineligibility for a visa in the first instance" (Pet. App. A, 36a-37a) which is completely devoid of minimum evidentiary support. There was no requirement that only victims of Nazi persecution were eligible for quota immigration visas either at the time petitioner was naturalized in 1954 or at the time he was granted a visa in 1948. The District Court's finding that no investigation would have ensued was obviously not "clearly erroneous."

At the trial the government called as its witness Seymour Finger, who as a Vice Consul had processed visas at the U. S. Consulate in Stuttgart, Germany for eleven months ending in February 1947. Former Vice Consul Finger did not interview petitioner with respect to his January 1947 application for a visa, which was issued in March 1948, and had never even examined his immigration file except in connection with his trial preparation. (J.A. 206-207). Mr. Finger's testimony in 1983 as to what he would have done with respect to petitioner's application for visa had he had doubts as to whether he was a victim of Nazi persecution and had he processed it in 1947 is at best retrospective conjecture based upon a faulty memory. No Vice Consul had the right to impose his own subjective standard or fashion a new criterion which was not embodied in the regulations governing the issuance of non-preference quota immigration visas. Congress did not delegate any authority to Vice Consuls to make informal policies not contained in the published regulations or presidential directives.

It would have been a clear violation of visa procedure for Vice Consul Finger to have given preference to displaced persons who were victims of Nazi persecution to the exclusion of refugees from the Russian front who were

not Nazi persecutees. The Immigration Visa Procedure then in effect provided: "Under no circumstances should an applicant for a quota immigration visa be issued such a visa out of his proper turn with other qualified applicants in the same category, as this would have the effect of according the applicant an unauthorized preference over other qualified applicants having earlier priority." Note 11, 22 C.F.R. § 61.301.

Nevertheless, apparently focusing on only part of the testimony of Mr. Finger, the Third Circuit proceeded in its *de novo* review based on the false premise that only victims of Nazi persecution were eligible for quota immigration visas. The record shows that the complete testimony of Mr. Finger on the bogus Nazi victim visa requirement was that, "This policy was contained in regulations issued by the federal government under which we operated." (J.A. 218. See also J.A. 227-228), and that the government attorneys during his trial preparations had shown him the purported regulations. (J.A. 218-219, 228). No such regulations were produced or could be produced by the government or could have been shown to Mr. Finger since they never existed. (Lodging, R. 1298). The District Court correctly found that Mr. Finger was in error. (Pet. App. C, 119a-120a n.7). The actual regulation then in effect provided that "displaced persons" covered by the President's Directive of December 22, 1945 were eligible for a first priority as to non-preference quota immigration visas. (Pet. App. E, 141a). The absence of any corroborative evidence or any direct evidence to establish that only victims of Nazi persecution were eligible for quota visas should have made Mr. Finger's testimony of no probative value to the Third Circuit.

There is no historical evidence that the category "displaced person" was coterminous with "victim of Nazi persecution" for any purpose, let alone visa eligibility. "Displaced person" to determine eligibility for United Nations Relief and Rehabilitation Administration ("UNRRA") assistance is defined in part 5.a. as "United Nations nationals who have been displaced as a result of the war from their countries of origin, citizenship, or previous residence" and the examples used in 5.a.(2)(a) expressly include "Former residents of Estonia, Latvia and Lithuania" as "United Nations nationals *prima facie* to be eligible." UNRRA Order No. 52, June 24, 1946 (Amicus App. I, 76a-77a). "Persecutees" was a separate category 5.b. and such persons did not have to be displaced "as a result of the war" and were eligible for UNRRA care "irrespective of the date they left their country or place of residence" (*id.* at 77a). Annex I of the Constitution of the International Refugee Organization ("IRO") signed by the United States on December 16, 1946, in Section A.2 defines the term "refugee" so that it "also applies to a person, other than a displaced person as defined in section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality." (Amicus App. J, 104a-105a).

The contemporaneously published Monthly Reviews of the Department of State, Immigration and Naturalization Service make no reference to limiting quota visas to victims of Nazi persecution. The January 1946 issue reported that "On December 22, 1945 President Truman

announced a far reaching program to facilitate the admission into the United States, within the framework of existing immigration laws and regulations, of displaced persons and refugees from Europe;" and emphasized that "The major group affected by President Truman's Directive of December 22, 1945 are displaced persons and refugees who are natives of Central and Eastern Europe and the Balkans." (Amicus App. B, 25a) The November 1946 issue reported that INS Commissioner Ugo Carusi, who was designated by President Truman to serve as Chairman of the interdepartmental Committee to implement the Directive of December 22, 1945, made a trip in March 1946 with the head of the Visa Division of the State Department, "to discover who the displaced persons were" and "to establish categories to describe those persons who could properly be described as displaced persons." (Amicus App. C, 30a-31a). After consultation with UNRRA, the Army and interested voluntary relief agencies, Comm. Carusi further reported five categories of "displaced person" and that, "Roughly stated, we did include . . . those who were forced to evacuate their homes for military reasons other than for service in the army, [and] persons who feared to return to their homes because of possible religious or political persecution . . ." (*id.*, at 31a) (Brackets added). Comm. Carusi also astutely observed that,

"For obvious reasons, many people are without birth or baptismal certificates and the Consuls are empowered to make allowances and use discretion in the matter of accepting unsupported statements. Many of these people have become suspicious of authority and have trained themselves over a period of years to lie in self preservation." (*id.*, at 32a).

Petitioner as a former Catholic seminarian and Lithuanian army officer fit within the categories of Lithuani-

ans who were designated by the NKVD for liquidation and imprisonment. See *Soviet Genocide in Lithuania*, Pajaujis-Javis, Library of Congress, 79-84640 at pp. 23-25, 38-42, and Hearings Before Select Committee on Communist Aggression, 83rd Congress, Second Session, 1954. His wife was rounded up by the Soviets only to receive a fortuitous reprieve (R. 1053). His father, a young sister and brother, who remained behind on their Lithuanian farm when petitioner, his wife and some of his brothers and sisters left in October 1944 as bombs were exploding on the farm, were sent by the Soviets to Mongolian concentration camps for ten years (J.A. 76). It is clear that petitioner came within the definition of "displaced person" as contemplated by the Truman Directive.

Furthermore the statistical reports of the INS, as to the composition of the "displaced persons" actually admitted to the United States on quota immigration visas issued pursuant to the President's Directive of December 22, 1945, negate the Third Circuit's uncorroborated hypothesis that only victims of Nazi persecution were eligible for such visas. During the period from December 22, 1945 to November 30, 1947, 26,801 displaced persons from over 40 countries in four continents were issued quota immigration visas under the President's Directive. (Amicus App. D, Table No. 1, 389a). That statistical compilation graphically demonstrates that U. S. Consulates used the comprehensive definition of "displaced person" in implementing the Presidential Directive of December 22, 1945 embodied in the regulations as published in the Federal Register (22 C.F.R. § 61.313) and not the narrow, partial definition of "refugee" which "also applies to persons who, having resided in Germany or Austria, and

being of Jewish origin or foreigners or stateless persons were victims of Nazi persecution" as contained in the IRO Constitution. (Amicus App. J, 105a).

Despite this plethora of accessible historical facts showing the wide scope of eligibility of displaced persons for non-preference quota immigration visas under the published regulations and the Truman Directive incorporated therein, the Third Circuit viewed the Truman Directive in isolation. It sidestepped the incorporation of the Truman Directive in the regulations as a basis for a priority in the issuance of non-preference quota immigration visas to "displaced persons covered by the Presidential Directive of December 22, 1945" by devoting a mere footnote to its misreading of the President's Directive of December 22, 1945 as speaking "only in general terms concerning the need to resettle displaced persons and particularly orphaned children." (Pet. App. A, 33a n.10). In fact, the median age of the 28,789 displaced persons admitted under the regulations was 31.9 years, with only 6,961 immigrants being under 21 years old (Amicus App. D, 40a), and the generality of the term "displaced persons" reflected the comprehensive scope of the persons to be resettled in the United States under the existing quota laws.

President Truman's Directive of December 22, 1945, as incorporated in 22 C.F.R. § 61.313(a)(3) remained operative for displaced persons and refugees receiving quota immigration visas regardless of race, religion or nationality until the June 25, 1948 enactment of the Displaced Person's Act of 1948, which defined "eligible displaced person" in Section 2(c) to "embrace three general classes: (1) persons who were brought into Germany by the Nazis as forced laborers; (2) persons who fled to the west before

the advancing Russian armies, and (3) persons, chiefly of Jewish origin, who fled from Germany or Austria during the Nazi regime and who have returned but who have not been resettled." *Displaced Persons In Europe*, Report of the Senate Committee on the Judiciary, Report No. 950, p. 54. The phrase "victims of Nazi persecution" as contained in the Annex to the IRO Constitution was only a partial definition of a sub-category of refugee, which was incorporated as a sub-part in the comprehensive definitions of Section 2(b), "Displaced person" and Section 2(c) "Eligible displaced person" of the Displaced Persons Act of 1948.

Petitioner, however, was issued his non-preference quota immigration visa under the quota for Lithuania in March, 1948 prior to the June 1948 enactment of the Displaced Persons Act of 1948. Even if Seymour Finger issued visas under the German and Austrian quotas only to victims of Nazi persecution, neither he, nor any other Vice Consul, could have excluded from the issuance of visas under the Lithuanian quota, refugees, such as petitioner, who fled to the west before the advancing Russian armies.

As to whether an investigation would have been conducted at the visa application stage, former Vice Consul Finger did not testify that he would inquire of the police whether an applicant had obtained a residency permit from the Third Reich as part of his considering whether he was a victim of Nazi persecution. Moreover he conceded that while he could direct inquiries to the displaced persons' camps, in fact he "rarely" did so. (J.A. 212). Out of 30 to 35 Lithuanians' applications for visas processed by

him, he made 2 or 3 inquiries to the Lithuanian representatives in the displaced persons' camps, although approximately one-third of the Lithuanian applicants had certificates similar to petitioner's from the Ex-Political Prisoner's Committee. (J.A. 220).

There was no need for the Third Circuit to speculate as to what an inquiry by a Vice Consul to the Lithuanian camp representative "probably" would have disclosed, since Vydaudas Vidiekunas, who signed petitioner's certificate (J.A. 29) as Secretary of the Lithuanian Ex-Political Prisoner's Committee testified at the trial below. The District Judge, who personally interrogated the witness, noted in his findings of fact, "Vidiekunas testified, truthfully I am convinced." (Pet. App. C, 115a). Vidiekunas, a former Lithuanian lawyer, testified that after being liberated by the Allies, the Lithuanian refugees in Germany organized a society of former prisoners from Nazi camps and prisons and that he was elected Secretary. In order to protect Lithuanian refugees from being ousted from the Baltic camps as a result of "screenings" by Soviet representatives of UNRRA (J.A. 69-70), his committee established a procedure for issuing certificates to Lithuanian refugees upon written proof from two witnesses that the refugee was active in the Lithuanian resistance against the Nazis. (Lodging, R. 913-914). The petitioner applied for his certificate on February 28, 1946 — 11 months before he even applied for a visa and the certificate was granted on June 18, 1946, after the committee received testimony from two witnesses that petitioner, and a fellow prisonmate of Vidiekunas, organized an underground newspaper with stolen printing presses hidden in old forts outside Kaunas. (Lodging, R. 917).

The District Court also found "some independent support for defendant's claim he performed work for the resistance" in Janson's testimony that petitioner distributed to him underground newspapers urging resistance to German mobilization. (Pet. App. C, 114a).

Vidiekunas further testified that petitioner's conduct in so assisting the Lithuanian resistance subjected him to the risk of being executed for high treason by the Nazis. (Lodging, R. 918). Petitioner was one of less than 200 persons who were issued the certificate by his committee and the purpose of issuing the certificate was not to assist Lithuanians in obtaining visas to the United States (Lodging, R. 919). Vidiekunas never heard that quota immigration visas were restricted to persons who were victims of Nazi persecution. (Lodging, R. 923).

Contrary to this Court's holding on April 21, 1986 in *Icicle Seafoods, Inc. v. Worthington, supra* at 1530, that, in reviewing a federal non-jury trial, a Court of Appeals "should not simply have made factual findings on its own", the Third Circuit after making its *de novo* finding of fact that an investigation would have ensued as a result of the discrepancy between petitioner's correct date and place of birth in some local records⁴ and the incorrect date

⁴ The Third Circuit's review of the record was faulty in asserting that petitioner gave his correct date of birth to the Tuebingen authorities under the Third Reich and an incorrect date of birth to the Tuebingen authorities during the Allied occupation. Government Exh. J-13 (J.A. 53-54) is the original entry document, the Register of Residents from the Office of the Mayor, Municipality of Ammerbach, Tuebingen District for the Community of Poltringen and it records the same incorrect place of birth of Kaunas and date of birth of October 4, 1913

(Continued on following page)

and place of birth on the visa application, made the additional finding that petitioner received a residence permit to reside in the rural community of Poltringen "without special conditions." (Pet. App. A, 32a). From that residence permit, the Third Circuit drew the unsupportable inference that "This information would tend to discredit the defendant's claim that he was persecuted by Nazi Germany." (Pet. App. A, 32a).

Since all refugees had to register with local authorities and thereby obtained residence permits "without special conditions"⁵ (other than prisoners of war) (Lodging, R. 843), the only supportable inference from the residence permit is that petitioner was a refugee who resided in that community. See Point I, *supra*, at pp. 17-18.

The residence permit is irrelevant to whether at a prior time and place petitioner was active in the anti-Nazi resistance in Lithuania as corroborated by two trial witnesses. Moreover, the petitioner truthfully disclosed on his visa application his residence in Poltringen (a community in Tuebingen District) commencing in October 1944. (J.A. 30). Indeed, his wife's INS "A" file contained the Tuebingen residence permit issued by that Provincial Council to foreign refugees before that com-

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set forth in petitioner's Lithuanian passport and visa application. Indeed, petitioner's correct date of birth is reflected in the post Allied occupation of Poltringen records as set forth in Exh. J-3T, J-5T, J-7T, J-8T and J-9T. (J.A. 60-61, 65-68).

⁵ The residence permits issued at that time by the Provincial Council for Tuebingen to Mrs. Kungys was a simple identification document which did not even contain the words "without special conditions or restrictions" and was in fact restricted as to area and duration. (Pet. App. H, 159a).

munity was liberated by the Allies (Pet. App. H). Those historical facts were obviously not a matter of concern or suspicion to the Vice Consul who processed together petitioner's and his wife's visa applications. Nor were residence permits issued to refugees by provincial councils before the end of the war an impediment to issuing a visa for petitioner, his wife, or any other refugee.

Moreover, the presumption is that the Vice Consul followed the normal procedures required by the regulations and either was satisfied with the Tuebingen residence permit in the file or, in fact checked the police records in Tuebingen District for the periods before and after the Allied occupation as indicated by the notation "Police dossier available" on petitioner's visa application. (J.A. 33). Presumably, the Tuebingen police would have confirmed that petitioner and his wife were issued residence permits since they were once registered there. Evidently the Vice Consul was more concerned that the police had no record of bad conduct, than whether there were incorrect dates of birth in the records of a rural community where there were numerous errors. (J.A. 53). There is nothing in the regulations or the presidential directive that indicates a Vice Consul also was required to determine if the petitioner was a victim of Nazi persecution.

Petitioner did not thwart any investigation by Vice Consul Schilling by misstating his date and place of birth. There is no possibility, let alone a probability, that any amount of investigation could uncover facts leading to a non-existent visa requirement that petitioner had to be a victim of Nazi persecution. Petitioner did not force the Vice Consul into any hasty decision. Petitioner had to wait fourteen months from the time of his application on

January 9, 1947 until the visa was granted on March 4, 1948. (J.A. 33).

The District Court found, "Defendant's flight from Lithuania and eventual settlement in Germany is best described by Youzas Koncius, who for the last 27 years has been a high school teacher in Illinois and whose testimony has the ring of complete truthfulness." (Pet. App. C, 115a). Koncius testified that he left Lithuania with petitioner and his family of eight in horses and wagons as shells were exploding on the farm of petitioner's father in October 1944, that they proceeded to the nearby German border along with long columns of other refugees, that they were stopped by the German S D and forced to dig ditches at gunpoint until petitioner organized an escape, that the ultimately got as far west as possible to where the Allies would come, that shelters were established in Tuebingen County by local civil authorities, including the Catholic farm community of Poltringen, where they along with Allied prisoners of war, assisted farmers, and that there were thousands of refugees in camps in Germany. (Lodging, R. 1216).

Nevertheless, the Third Circuit ignored the findings of the District Court based on the credible testimony of Koncius, Vidiekunas and Janson and drew its own inference from a residence permit to live as a refugee in a rural community shortly before the Allies liberated the area, that it would "tend to discredit" petitioner's claim he was "persecuted by the Nazis." Proceeding from that unwarranted inference, the Third Circuit reached the false conclusion that petitioner was not eligible for a non-preference, quota immigration visa. (Pet. App. A, 32a-33a).

In various criminal contexts (to which these cases bear a closer resemblance than a common law civil case,) this Court has repeatedly held that the use of an administrative presumption or an inference (such as whether an investigation would have ensued or whether the issuance of a residence permit "without special conditions" negated being eligible for a visa) to eliminate an element of the prosecution's proof violates due process. See *Francis v. Franklin*, 105 S. Ct. 1965 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

There is nothing on the visa application to even suggest that the absence of being a victim of Nazi persecution is an excludable class although it set forth 31 classes of excludable persons. (J.A. 31-32). The former Vice Consul who actually processed petitioner's visa application had no recollection of any such requirement. (J.A. 175). Former Vice Consul Frank Schilling was asked by petitioner's counsel: "Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?" and he answered: "No. That I don't remember." (J.A. 175). That Trial Exhibit was not included in the Appendix before the Third Circuit because the Government did not even raise the issue of any such requirement in its required Statement of the Issues before the Third Circuit in its Civil Appeal Information Statement, which is relied upon when preparing the Appendix in the Third Circuit.

When trial counsel for petitioner proffered the State Department Circular of July 8, 1947 (Pet. App. G, 152a-155a), it was rejected by the District Court on the grounds, "It is of marginal relevance." In response to

trial counsel's argument, "Its only of marginal relevance if Your Honor accepts the argument that there was no such regulation about being a victim of Nazi persecution. Court: Nobody has shown it to me yet. Mr. Lynch [OSI trial attorney] have you shown me such a regulation? Mr. Lynch: No, sir." (Lodging, R. 1298). (Brackets added).

The Statement and Directive of President Truman of December 22, 1945 (Pet. App. F, 143a-151a) incorporated in regulation, § 61.313(a)(3)(i)(c), makes no reference to any requirement that displaced persons or refugees also had to be victims of Nazi persecution or that they were coterminous. To the contrary it expressly states, "This Government should take every possible measure to facilitate full immigration to the United States under *existing* quota law." (Emphasis added) (Pet. App. F, 148a). There was nothing in the then existing quota law that required an immigration visa recipient to be a victim of Nazi persecution.

Neither the Complaint, nor the Amended Complaint, nor the statutorily required Affidavit of Good Cause in support of those Complaints, nor the Pre-Trial order limiting proof, alleges either that petitioner misrepresented that he was a victim of Nazi persecution during either the visa or naturalization proceedings or that the lack of being a victim of Nazi persecution was a disqualifying fact, making the petitioner ineligible for a non-preference immigration quota visa. Nor did the Government's Civil Appeal Information Statement, Statement of Issues or Briefs on Appeal raise those issues. The Third Circuit's faculty *de novo* fact finding and issue creation

without notice to the petitioner violate his right to due process under the Fifth Amendment. See *Dunn v. United States*, 442 U.S. 100 (1979), *Pullman-Standard v. Swint*, *supra*, and *Icicle Seafoods, Inc. v. Worthington*, *supra*.

Unlike the Third Circuit in the instant case, this Court has refused to consider matters outside the Complaint in denaturalization cases. The Government's proof in a denaturalization proceeding is limited, as in a criminal proceeding, to matters charged in the Complaint, *Schneiderman v. United States*, 320 U.S. 118, 160 (1943). There could be no clearer violation of due process of law than here where the Third Circuit has injected its own issue and developed its own false factual predicate in total disregard of the pleadings, the District Court's findings of fact and the trial record of evidence. The Third Circuit ignored Exhibit 38-D, (J.A. 174-180), the transcript of former Vice Consul Frank Schilling who actually processed petitioner and his wife's visa applications; Exhibit C-1 (Pet. App. H, 156a-159a) — Mrs. Kungys' residence permit from Tuebingen prior to the Allied occupation; and Exh. 54-D for *id.* (Pet. App. G, 152a-155a) — the Department of State circular, dated July 8, 1947, "Information Concerning Immigration Into the United States From Germany and Austria" showing that visas were issued to "displaced persons" and containing no requirement of being a victim of Nazi persecution. Moreover, even as to the Third Circuit's straw man issue, the Third Circuit ignored the deposition testimony of Walter Janson (Dep. 40, 44-48, 54) which the trial court found was "some support for defendant's claim he performed work for the resistance." (Pet. App. C, 114a).

That the hypothesized "Nazi persecution" requirement for a visa is a bogus revision of historical fact is farther demonstrated by the District Court's review and analysis in *United States v. Kairys*, 600 F. Supp. 1254 (N.D.Ill. 1984), *aff'd*, 782 F.2d 1374 (C.A. 7, 1986), *cert. denied*, 106 S. Ct. 2258 (1986), where it is noted that even "a German who voluntarily served in such units as the Waffen SS was eligible to be a quota immigrant." *Id.*, at 1266 n.5).

It is certain that no amount of investigation at either the naturalization or visa stage could have discovered a non-existent requirement that only victims of Nazi persecution were eligible for quota immigration visas. It is equally certain that it is unclear as to what significance, if any, attached to the transmittal of a residency permit with a form letter on which it was printed "without special condition." At best, it is equivocal and still leaves in doubt whether such a permit had any bearing on whether its recipient was otherwise a victim of Nazi persecution.

The admonition of Chief Judge Aldisert to his brethren on the Third Circuit in his dissenting opinion in the *en banc* *United States v. Kowalchuk* decision is especially apt:

"I quickly recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during totally devastating war-time conditions, in enemy territory, over forty years ago. Indeed, this realization lies at the core of the due process issues. . . In all cases, an appellate court should adhere closely to the district court's determination of witness credibility; under these special

conditions, this requirement assumes a *fortiori* proportions." 773 F.2d 488, 499 (C.A. 3, 1985).

The manner in which the Third Circuit applied its so-called "probability" test for the second prong of *Chaunt* in this case is a clear illustration as to why this Court should not permit a dilution of the clear, unequivocal and convincing burden of proof on all the issues at each stage of the proceedings before a citizen can be denaturalized. It is especially important because only a certainty test can prevent a miscarriage of justice when judges have to apply the law under the hydraulic pressure of the gruesome allegations which accompany this decade's wave of denaturalization cases. Indeed, the Third Circuit's opinion shows an unnecessary preoccupation with the Soviet evidence on atrocities, although it did not reach the issue and thus did not reverse the District Court's holding that the Soviet evidence was unreliable and inadmissible.

Under the rubric of a "probability" test for materiality under the second prong of *Chaunt*, the Third Circuit has reached a legal conclusion so totally devoid of evidentiary support as to amount to no evidence at all; and it has done it in a way so detached from the allegations in the pleadings and the controlling standard of review of the District Court's findings as to render this revocation of citizenship an unconstitutional deprivation of due process of law.

CONCLUSION

For the various reasons set forth herein the judgment of the Third Circuit should be reversed and the matter remanded to the District Court for reinstatement of its judgment dismissing the complaint.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

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QUESTIONS PRESENTED

1. Whether petitioner's submission, in his visa and citizenship applications, of false information concerning his date of birth, place of birth, wartime residence, and wartime occupations, constituted a "material" misrepresentation warranting his denaturalization under 8 U.S.C. 1451(a).

2. Whether petitioner's deliberate and repeated misrepresentations and concealments, made under oath and in the form of forged documents, rendered his citizenship "illegally procured" under 8 U.S.C. 1101(f)(6), 1427(a)(3), and 1451(a) on the ground that he lacked the requisite good moral character.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	1
Summary of argument	13
Argument:	
I. Petitioner's misrepresentations were material under 8 U.S.C. 1451 (a)	16
A. A misrepresentation is material if disclosure of the truth would have led to an investigation that might have uncovered facts warranting denial of a visa or citizenship....	16
B. Petitioner's misrepresentations were material under any standard	29
1. Discovery of the true facts would have led to an investigation	29
2. The investigation would likely have led to the discovery of disqualifying facts....	34
a. The investigation would have resulted in the denial of petitioner's visa application because of falsified information concerning his identity..	34
b. The investigation probably would have led to the discovery of facts resulting in the denial of petitioner's visa or petition for naturalization on the ground that petitioner was not a victim of persecution	35

IV

Argument—Continued:

Page

- c. The investigation probably would have led to the denial of the petition for naturalization on the ground that petitioner was not a person of good moral character 42
- d. The investigation might have led to the discovery of facts showing petitioner's role in the atrocities at Kedainiai 44

- II. In light of his pattern of repeated misrepresentations, petitioner's citizenship was illegally procured, since he was not a person of good moral character 45

Conclusion 49

Appendix 1a

TABLE OF AUTHORITIES

Cases:

<i>Berenyi v. District Director</i> , 385 U.S. 630 (1967) ..	23, 33
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960)	12, 13, 14, 17, 18, 19
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979)	24
<i>Corrado v. United States</i> , 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956)	20
<i>Costello v. United States</i> , 365 U.S. 265 (1961)	16, 21
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981) ..	12, 16, 17, 20, 21, 22, 23, 28, 36
<i>Ganduxe y Marino v. Murff</i> , 183 F. Supp. 565 (S.D.N.Y. 1959), aff'd, 278 F.2d 330 (2d Cir.), cert. denied, 364 U.S. 824 (1960)	20
<i>Johannessen v. United States</i> , 225 U.S. 227 (1912)	48
<i>Kassab v. INS</i> , 364 F.2d 806 (6th Cir. 1966)	22
<i>La Madrid-Peraza v. INS</i> , 492 F.2d 1297 (9th Cir. 1974)	22
<i>Landon v. Clarke</i> , 239 F.2d 631 (1st Cir. 1956)	31
<i>Langhammer v. Hamilton</i> , 295 F.2d 642 (1st Cir. 1961)	22

Cases—Continued:

Page

<i>Maikovskis v. INS</i> , 773 F.2d 435 (2d Cir. 1985), cert. denied, No. 85-1483 (June 16, 1986).....	28
<i>McCandless v. United States ex rel. Murphy</i> , 47 F.2d 1072 (3d Cir. 1931)	30
<i>NLRB v. Amax Coal Co.</i> , 453 U.S. 322 (1981)....	25
<i>Petition of Ledo</i> , 67 F. Supp. 917 (D.R.I. 1946)....	46
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982)..	34
<i>Ralich v. United States</i> , 185 F.2d 784 (8th Cir. 1950)	46
<i>Robles v. United States</i> , 279 F.2d 401 (9th Cir. 1960), cert. denied, 365 U.S. 836 (1961).....	26
<i>S- and B-C-, In re</i> , 9 I. & N. Dec. 444 (1961)	22
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943)	17, 23, 28
<i>Tieri v. INS</i> , 457 F.2d 391 (2d Cir. 1972)	46
<i>Tzantarmas v. United States</i> , 402 F.2d 163 (9th Cir. 1968), cert. denied, 394 U.S. 966 (1969)....	26
<i>United States v. Accardo</i> , 113 F. Supp. 783 (D. N.J.), aff'd, 208 F.2d 632 (3d Cir. 1953), cert. denied, 347 U.S. 952 (1954)	46
<i>United States v. Al-Kurna</i> , No. 86-3402 (5th Cir. Jan. 15, 1987)	27
<i>United States v. Bramblett</i> , 348 U.S. 503 (1955)..	26
<i>United States v. Chandler</i> , 152 F. Supp. 169 (D. Md. 1957)	20
<i>United States v. D'Agostino</i> , 338 F.2d 490 (2d Cir. 1964)	31, 32
<i>United States v. DeLucia</i> , 256 F.2d 487 (7th Cir.), cert. denied, 358 U.S. 836 (1958)	31
<i>United States v. Flores-Rodriguez</i> , 237 F.2d 405 (2d Cir. 1956)	27
<i>United States v. Forrest</i> , 69 F. Supp. 389 (D.R.I. 1946)	46
<i>United States v. Goldstein</i> , 30 F. Supp. 771 (E.D. N.Y. 1939)	30
<i>United States v. Gremillion</i> , 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972)	25
<i>United States v. Ginsberg</i> , 243 U.S. 472 (1917)....	17
<i>United States ex rel. Karpay v. Uhl</i> , 70 F.2d 792 (2d Cir.), cert. denied, 293 U.S. 573 (1934)....	30

Cases—Continued:

	Page
<i>United States v. Kairys</i> , 782 F.2d 1374 (7th Cir. 1986), cert. denied, No. 85-1752 (May 27, 1986)	47, 48
<i>United States v. Koziy</i> , 728 F.2d 1314 (11th Cir.), cert. denied, 469 U.S. 835 (1984)	22, 48
<i>United States v. Lardieri</i> , 497 F.2d 317 (3d Cir. 1974)	25
<i>United States v. Lopez</i> , 728 F.2d 1359 (11th Cir. 1984)	26
<i>United States v. Lumantes</i> , 139 F. Supp. 574 (N.D. Cal. 1955), aff'd, 232 F.2d 216 (9th Cir. 1956)	20
<i>United States v. Oddo</i> , 314 F.2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963)	21
<i>United States v. Montalbano</i> , 236 F.2d 757 (3d Cir.), cert. denied, 352 U.S. 952 (1956)	20
<i>United States v. Palciauskas</i> , 734 F.2d 625 (11th Cir. 1985)	22, 42
<i>United States v. Ramos</i> , 725 F.2d 1322 (11th Cir. 1984)	26
<i>United States v. Riela</i> , 337 F.2d 986 (3d Cir. 1964)	48
<i>United States v. Shapiro</i> , 43 F. Supp. 927 (S.D. Cal. 1942)	30
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (10th Cir. 1983)	22
<i>United States v. Valdez</i> , 594 F.2d 725 (9th Cir. 1979)	26
<i>United States v. Wiggan</i> , 673 F.2d 145 (6th Cir.), cert. denied, 456 U.S. 1011 (1982)	27
<i>Ventura-Escamilla v. INS</i> , 647 F.2d 28 (9th Cir. 1981)	29
<i>Yao Quinn Lee, In re</i> , 480 F.2d 673 (2d Cir. 1973)	46
<i>Zychole, In re</i> 43 F.2d 438 (E.D. Mich. 1930)....	30

Constitution, statutes, regulations and rule:

U.S. Const. Art. I (Ex Post Facto Clause)	48
Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 <i>et seq.</i>	21

VII

Statutes, regulations and rule—Continued:

Page

Equal Access to Justice Act, 28 U.S.C. (& Supp. III) 2412:

28 U.S.C. 2412(b)	2
28 U.S.C. 2412(d)	2

Immigration Act of 1924, ch. 190, 43 Stat. 153 *et seq.*

5

§ 7, 43 Stat. 156-157	31, 46, 1a
§ 7(b), 43 Stat. 156	5, 1a
§ 7(c), 43 Stat. 156	5, 32, 2a

Immigration and Nationality Act of 1952, 8

U.S.C. (& Supp. III) 1101 *et seq.*:

§ 101(f) (6), 8 U.S.C. 1101(f) (6)	15, 43, 45, 48
§ 103(a), 8 U.S.C. 1103(a)	22
§ 212(a) (1)-(7), 8 U.S.C. (& Supp. III) 1182(a) (1)-(7)	28
§ 212(a) (8), 8 U.S.C. 1182(a) (8)	28
§ 212(a) (11), 8 U.S.C. 1182(a) (11)	28
§ 212(a) (15), 8 U.S.C. 1182(a) (15)	28
§ 212(a) (27)-(29), 8 U.S.C. 1182(a) (27)-(29)	28
§ 212(a) (33), 8 U.S.C. 1182(a) (33)	28
§ 222, 8 U.S.C. 1202	31
§ 241, 8 U.S.C. 1251	43
§ 241(f), 8 U.S.C. 1251(f)	43
§ 244(a) (1), 8 U.S.C. 1254(a) (1)	2
§ 316(a), 8 U.S.C. 1427(a)	15, 18, 43, 45, 48, 3a
§ 316(e), 8 U.S.C. 1427(e)	45, 3a
§ 340(a), 8 U.S.C. 1451(a)	<i>passim</i>
§ 340(i), 8 U.S.C. 1451(i)	48

Nationality Act of 1940, ch. 876, § 340, 54 Stat. 1160

48

Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596-598, as amended by Act of Mar. 2, 1929, ch. 536, § 6, 45 Stat. 1513-1514 (8 U.S.C. 1427(a))

18

Pub. L. No. 87-301, 75 Stat. 650 *et seq.*:

§ 17, 75 Stat. 656	48
§ 18, 75 Stat. 656	47
§ 19, 75 Stat. 656	48

VIII

Statutes, regulations and rule—Continued:	Page
8 U.S.C. (1940 ed.) 738 (a)	24
18 U.S.C. 1001	14, 25, 26, 46
18 U.S.C. 1015 (a)	27, 46
18 U.S.C. 1546	27
18 U.S.C. 1621	14, 25, 27, 46
18 U.S.C. 1623	25
22 C.F.R. (1946) :	
Section 61.327 (e)	5, 32
Section 61.327 (f)	5, 32
Section 61.327 (g)	5, 32
Section 61.329	30
Fed. R. Civ. P. 41 (b)	39

Miscellaneous:

94 Cong. Rec. 7861 (1948)	36
C. Gordon & H. Rosenfield, <i>Immigration Law and Procedure</i> (1986) :	
Vol. 1A	31
Vol. 3	20
<i>Hearings on H.R. 2910 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary, 80th Cong., 1st Sess. (1947)</i>	36
S. Rep. 950, 80th Cong., 2d Sess. (1948)	36
S. Rep. 1515, 80th Cong., 1st Sess. (1950)	24
S. Rep. 1137, 82d Cong., 2d Sess. (1952)	24

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 793 F.2d 516. The opinion of the district court (Pet. App. 39a-137a) is reported at 571 F. Supp. 1104.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on June 20, 1986. The petition for a writ of certiorari was filed on August 9, 1986, and was granted by this Court on November 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set out in an appendix to this brief.

STATEMENT

In 1981, the United States filed an action, pursuant to Section 340(a) of the Immigration and Nationality Act

of 1952 (the 1952 Act), 8 U.S.C. 1451(a), to revoke petitioner's citizenship on the ground that it was illegally procured and that it was procured on the basis of material misrepresentations. Specifically, the United States alleged in its amended complaint that (1) in July and August 1941, petitioner had participated in the murder of more than 2000 unarmed civilians by forcing the victims into a mass grave and shooting them; and (2) in connection with his visa and citizenship applications, petitioner had provided false testimony and documents concerning his date and place of birth, his place of residence during 1940-1942, and his wartime occupation. Pet. App. 3a, 40a-45a; J.A. 4-25.¹ Following a nonjury trial, the district court ruled that the government had failed to establish any ground for revoking petitioner's citizenship (Pet. App. 39a-137a).² The court of appeals reversed and remanded for denaturalization proceedings. Without reaching the question whether petitioner had participated in the mass murders, it held that petitioner's citizenship was procured on the basis of material misrepresentations. *Id.* at 1a-37a.³

¹ The government also alleged that petitioner had misrepresented his true marital status, but it later withdrew that charge (Pet. App. 45a n.1; see also C.A. App. 172-176) ("C.A. App." refers to the three volume appendix, including the trial transcript, filed in the court of appeals; "C.A. Exh." refers to the four volumes of trial exhibits filed in the court of appeals).

² The court later denied petitioner's request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(b) and (d), on the ground that the government had "conducted extensive and responsible investigation of the charges it brought against [petitioner]" and had a reasonable basis for the facts alleged in the complaint (575 F. Supp. 1208, 1210, 1211 (D.N.J. 1983)).

³ By remanding for denaturalization proceedings, the court of appeals opened the way to the commencement of deportation proceedings; petitioner's denaturalization does not automatically result in his deportation. If, in the deportation proceeding, the immigration judge does not find that petitioner assisted in acts of persecution, then petitioner could be eligible for various forms of relief from deportation, such as suspension of deportation (8 U.S.C. 1254(a)(1)). Petitioner therefore errs in characterizing his case as "tantamount to [a] capital case[]" (Pet. 12).

1. Petitioner, a native of Lithuania, obtained a non-preference quota visa in March 1948 from the American consulate in Stuttgart, Germany. He emigrated to the United States later that year and was naturalized in 1954. Pet. App. 3a, 120a-121a.

The evidence at trial revealed that petitioner was born on September 21, 1915, in Reistru Village in the Taurage Region of Lithuania. He entered military service in 1938 and later graduated from cadet school. On December 1, 1939, after having attained the rank of junior lieutenant, he left military service and began working at the Bank of Lithuania in Kedainiai. While living in Kedainiai, petitioner joined the Sauliai (Riflemen's Association), a paramilitary organization. Pet. App. 109a, 110a; J.A. 138-139; C.A. App. 991-992.

On June 22, 1941, Nazi Germany invaded the Soviet Union, and German troops soon reached Lithuania. The Third Reich promptly began identifying, confining, and ultimately murdering all Jews in the occupied areas except for a small number who were used for forced labor. German commando units known as the SS-Einsatzkommandos were responsible for exterminating the Jews and other groups deemed inimical to the Third Reich. For the most part, however, the SS-Einsatzkommandos were not able to carry out all of the arrests and executions by themselves. Accordingly, they relied heavily on local residents to assist in carrying out those activities. Pet. App. 48a-64a.

Two mass killings occurred in Kedainiai in the summer of 1941 while petitioner was a resident there. The first occurred on July 23, 1941. Using the SS-Einsatzkommandos, the Nazis recruited local collaborators who had been members of the Sauliai or who had been in the Lithuanian military. Approximately 125 former Communists or Soviet government officials were arrested, taken in trucks to a nearby forest, and forced into a large pit where they were shot. The second mass murder occurred on August 28, 1941, and involved the Jewish residents of the town. Having already been forced to live in a ghetto and observe severe restrictions, they were

taken to a horse breeding farm on the outskirts of town and confined there. They were then led to a huge pit, were ordered to undress, and were shot. Official German records reveal that more than 2000 Jewish men, women, and children were murdered on August 28. Pet. App. 4a, 62a, 70a-73a, 111a.⁴

In October 1941, petitioner left Kedainiai and moved to Kaunas, the capital of Lithuania (Pet. App. 111a). According to information he later provided to the German authorities, petitioner worked in Kaunas as an industrial manager, although he maintained at trial (and the district court so found) that his statements to the Germans describing his position were somewhat exaggerated (*id.* at 117a; Lodging Tr. 866). Petitioner and his wife moved again in October 1944 (at the time the German armed forces retreated from the Soviet Union), this time to Tuebingen, in Nazi Germany. Petitioner was given permission by the Nazi regime to live there without special restrictions. His residence permit was granted on

⁴ At trial, the government introduced deposition testimony, taken in Lithuania, of several eyewitnesses to the July and August murders. Three of the witnesses implicated petitioner in the atrocities. They testified that petitioner was one of the leaders of the Lithuanians who assisted the Germans and that he personally gave orders and participated in the shootings. See Pet. App. 4a-5a & n.1. The district court was concerned about the reliability of Soviet-source depositions, supervised by Soviet procurators, even though counsel for the United States and petitioner actually conducted most of the questioning, and even though some of the witnesses gave testimony that did not implicate petitioner. In addition, although all prior statements of witnesses taken in this case were turned over to petitioner, the court was troubled that the United States was unable to obtain from the Soviet Union statements signed by certain of the witnesses in the 1940's (*id.* at 105a, 107a). The court therefore admitted the depositions solely for the purpose of showing that the atrocities actually occurred (*id.* at 108a). Despite its evidentiary ruling, however, the court acknowledged at one point (*id.* at 75a) that "[t]he government's charges find strong support in three of the depositions taken in Lithuania." The court of appeals did not find it necessary to reach the question whether the district court erred in refusing to consider the depositions as evidence against petitioner (*id.* at 6a). See note 15, *infra*.

February 13, 1945, prior to the end of the war. In addition, his wife applied to the Nazi authorities for permission to practice dentistry.⁵ Petitioner and his wife remained in the Tuebingen region until Allied Forces occupied the area in May 1945. Pet. App. 7a, 115a-117a; J.A. 57, 59-60.

2. a. In January 1947, petitioner and his wife applied in Stuttgart for a nonpreference quota immigration visa under the Immigration Act of 1924 (the 1924 Act), ch. 190, 43 Stat. 153 *et seq.*⁶ When petitioner applied for his visa, he did not submit any of the documents in his possession or available to him that showed his true date and place of birth. See note 6, *supra*. Instead, he submitted four falsified documents: (1) a police record from Fellbach, Stuttgart, listing a false date and place of birth (Oct. 4, 1913, Kaunas, Lithuania) (J.A. 37); (2) a record from the Vatican representative in Germany listing the same false date and place of birth (J.A. 38); (3) a Lithuanian identity card, also listing the false date and place of birth (J.A. 28-29); and (4) a certificate from the Lithuanian Ex-Political Prisoners Nazi Victims Central Committee, which similarly listed the false date and place of birth and which indicated that petitioner had

⁵ In Tuebingen, petitioner was required to register with local authorities. The Tuebingen records all reflect petitioner's true place of birth and most of them reflect his true date of birth (Pet. App. 117a; J.A. 56, 65-68).

⁶ Under Section 7(b) and (c) of the 1924 Act (43 Stat. 156), petitioner was required to provide certain specified biographical information, including his date and place of birth, certified copies of his birth certificate, if available, and "all other available public records concerning him kept by the Government to which he owes allegiance." The regulations provided that if a birth certificate was not available, other documentary evidence of identity had to be produced (22 C.F.R. 61.327(e), (f) and (g) (1946)). Petitioner admitted at trial (C.A. App. 1018-1020) that when he applied for a visa in 1947, he had in his possession a Lithuanian identification document reflecting his true place of birth (J.A. 51-52). Similarly, in applying for matriculation at Tuebingen University in 1945, petitioner provided a 1938 seminary record listing his true date and place of birth (J.A. 61-63).

been "persecuted by the gestapo" (J.A. 29). Petitioner's visa application (J.A. 30-34), executed under oath, also listed a false date and place of birth (J.A. 30). Additionally, his visa application indicated that from 1940 to 1942 he resided in Telsiai, Lithuania (*ibid.*);⁷ petitioner did not reveal that he had lived in Kedainiai from 1939 through October 1941. Finally, petitioner's visa application listed his occupation as dental technician (*ibid.*); it did not reveal his position as a bank employee and the supervisor of a factory during the Nazi occupation of Lithuania. Pet. App. 111a, 118a-119a.

In addition to the visa application and the falsified documents, petitioner also executed under oath an Alien's Registration Foreign Service Form (J.A. 34-37). Like his other materials, that form specified a false date and place of birth (J.A. 35) and omitted reference to any work activity other than "dental technician, farmer, and forestry work" (*ibid.*).

On the basis of the information he submitted, petitioner was issued a visa on March 4, 1948. He entered the United States on April 29, 1948, upon presentation of his visa. Pet. App. 120a.

b. At trial, the government offered evidence concerning visa application procedures and the significance of false statements made by visa applicants. Specifically, former Ambassador Seymour Finger, who had been a vice consul in Stuttgart at the time petitioner submitted his application there,⁸ testified that a visa applicant would first fill out preliminary forms that were reviewed by local employees. If those forms were in order, the applicant would then complete a visa application and an alien registration form and would submit identifying documents, such as his birth certificate. The entire file

⁷ The record contains no evidence of any atrocities having been committed in Telsiai (Pet. App. 34a).

⁸ The vice consul who actually reviewed petitioner's application was not available and, in any event, indicated to petitioner's attorney in a telephone conversation that he had no recollection of the requirements for obtaining a visa (J.A. 175). See pages 37-38, *infra*.

would then be reviewed by a vice consul, and if everything appeared to be in order, an interview would be scheduled with the applicant. During the interview, the vice consul would focus on the applicant's biographical information, looking particularly at his residence and occupation between 1939 and 1945. As part of the procedure, the applicant was required to swear under oath to the truth of all of the statements in the application. The applicant was permitted to make corrections to the forms during the interview, but only to correct oversights and not to alter deliberate or willful falsifications of significant items. Pet. App. 30a, 117a-118a; J.A. 187-194.

Finger testified that during his tenure at Stuttgart, if a person lied under oath concerning his date and place of birth, wartime occupation, or wartime residence, the visa would be routinely denied (J.A. 200-201). Similarly, a visa would be denied if the applicant submitted falsified documents and withheld documents containing true information (J.A. 200), or if he lied about his date and place of birth to United States immigration officials and had, prior to that time, given truthful information to the German authorities (J.A. 202). Likewise, the applicant's visa would be denied if the applicant falsely claimed to have been persecuted by the Gestapo (J.A. 201). Finger also testified that during the relevant period the policy at Stuttgart was to grant visas only to persons who had close relatives in the United States and to those who had been victims of Nazi persecution. Pet. App. 29a-32a; J.A. 187, 197, 213-214, 217-218.

3. a. In May 1948, one month after arriving in the United States, petitioner submitted an application for a certificate of arrival and a declaration of intent to become a United States citizen (J.A. 38-41). In that application, petitioner again represented falsely that he was born on October 4, 1913, in Kaunas, and he again concealed his wartime employment (J.A. 40). Moreover, he certified that the assertions in his application were

"true to the best of [his] knowledge and belief" (J.A. 41).

In October 1953, petitioner applied for naturalization. At that time, he executed under oath a detailed application form (J.A. 42-48).⁹ In the application, petitioner denied having ever "given false testimony to obtain benefits under the immigration or naturalization laws" (J.A. 45). He continued to maintain that he was born October 4, 1913, in Kaunas (*ibid.*).¹⁰ Also in connection with his citizenship application, petitioner executed under oath a Petition for Naturalization (J.A. 48-50). In that petition, he similarly gave a false date and place of birth (J.A. 48). He also swore that he was a person of good moral character (J.A. 49). As part of the application process, petitioner was first interviewed under oath by the preliminary naturalization examiner; each question in the application was reviewed with petitioner, and he verified each answer (J.A. 145-150, 157-158). A designated naturalization examiner also questioned petitioner under oath (J.A. 152-153, 160-162). In February 1954, the district court granted petitioner's application for citizenship. Pet. App. 36a, 117a-118a, 120a-121a.

b. Julius Goldberg, now a retired immigration judge, was the designated examiner who processed petitioner's naturalization application.¹¹ He testified in a deposition admitted at trial that he invariably asked applicants to reaffirm under oath their prior statements given to the preliminary examiner. He also testified that one task of an examiner was to compare the information in a naturalization application with the documents and information provided by the alien when he applied for a visa.

⁹ The form made clear at the outset (J.A. 42) that "citizenship [could] be revoked for concealment of a material fact or for willful misrepresentation."

¹⁰ Petitioner made a variety of corrections on the form (see J.A. 47), but he did not correct the false date and place of birth.

¹¹ Petitioner's preliminary naturalization examiner was deceased (J.A. 155).

If a discrepancy appeared, the naturalization application could be rejected outright or suspended pending an investigation by immigration authorities to determine deportability. If an applicant willfully gave false testimony to immigration and naturalization officials, Goldberg testified, his application could be rejected on the ground that he did not possess the requisite good moral character. Pet. App. 36a; J.A. 160-162, 165, 170-171.

4. In 1975, an investigator from the Immigration and Naturalization Service (INS) questioned petitioner under oath regarding his activities prior to entering into the United States (J.A. 70-79). Petitioner falsely stated to the investigator that he had been born on October 4, 1913, in Kaunas (J.A. 72). Contrary to his visa application (J.A. 30), he admitted that he had lived in Kedainiai between 1939 and 1941, but he claimed that he left Kedainiai in June 1941 (J.A. 73). Subsequently, in April 1977, while his case was still under investigation by the INS, petitioner submitted to immigration officials an employment certificate that purported to evidence his employment in Kaunas as of July 6, 1941 (GX A13; C.A. Exh. 38).¹²

In 1981, petitioner was again interviewed under oath, this time by attorneys from the Department of Justice (J.A. 79-137). Petitioner continued to maintain that he left Kedainiai before the atrocities in July and August 1941 and that he commenced employment in Kaunas on July 6, 1941 (J.A. 85). Petitioner indicated (J.A. 115) that he could not recall why he had omitted any reference to his residence in Kedainiai when applying for his visa. Throughout most of the questioning, he maintained that he had been born on October 4, 1913, in Kaunas

¹² The district court (Pet. App. 111a) characterized the certificate as "somewhat suspect." It pointed out (*ibid.*) that the date petitioner was supposed to have commenced work (July 6, 1941) was a Sunday. The court also noted (*ibid.*) that the letterhead on the form was written in both Lithuanian and German, and that, while not inconceivable, "[t]his would have represented a rather rapid transition, since the Soviet Army had been driven from the City less than two weeks before the July 6 date."

(J.A. 80-81, 104, 112- 129-130). When shown documents evidencing his true date and place of birth, he claimed that those documents were Russian forgeries (J.A. 104-105). At the end of the interview, however, petitioner changed his story and admitted that the supposed forgeries were indeed correct (J.A. 131-132). Contrary to his representations to United States government officials for over three decades, petitioner admitted that he had indeed been born on September 21, 1915, in Reistru, Lithuania (*ibid.*). He claimed that he had altered his date and place of birth because he had been a member of the Lithuanian underground during the war and was being hunted by the Germans at the time he moved to Germany (*ibid.*). He did not explain why this deception was still necessary in 1953, when he was in the United States applying for citizenship. Nor did he explain why he had given his true name to the Nazis (see J.A. 59-60) or why he had given his true name, date, and place of birth to the Germans after the end of the war (see J.A. 60-61, 63-68).

On September 12, 1981, petitioner sent a letter to a Lithuanian emigre requesting his help in giving testimony (J.A. 138). In that letter, petitioner stated that he had lived in Kedainiai "from December 1939 until October 1941"—a period that included both the July 1941 and August 1941 mass murders—and that he had been a member of the Riflemen's Association (*ibid.*).

The government also obtained a letter signed by petitioner indicating that he was resigning from his job at the bank in Kedainiai effective October 16, 1941 (J.A. 51; Lodging Tr. 670-671). The letter, dated October 10, 1941, further indicated that petitioner was "[r]esiding at No. 3 Radvila St.[,] Kedainiai" (J.A. 51).

In the course of discovery in this case, petitioner responded to one of the government's interrogatories by stating that he had obtained false Lithuanian identification (J.A. 28-29) prior to entering the United States in order to avoid conscription into the Germany Army (Pet. App. 113a). Petitioner did not reiterate his prior claim

that he had been hunted by the Gestapo because of his participation in the Lithuanian underground.

At trial, petitioner admitted that he was in fact born in 1915 in Reistru, and he acknowledged that his visa and naturalization applications were false in those respects (Lodging Tr. 617-618, 620-623). When confronted with a series of official records from Germany predating his visa application that showed his correct date and place of birth, petitioner testified that he could not explain why those records had the correct information (*id.* at 859-860). Petitioner also continued to maintain that he had left Kedainiai only a few days after the German invasion and that he was not living in Kedainiai between July and October 1941 (*id.* at 756, 771). When petitioner was confronted with the letter he had written to the Lithuanian emigre indicating that he lived in Kedainiai until October 1941, he testified that the letter was simply "expanding too much" on that particular point (*id.* at 761-762). When shown the letter he had signed indicating that he had resigned from his job in Kedainiai effective October 16, 1941, petitioner simply denied that he was living or working at Kedainiai in October of that year (*id.* at 671-673). He had no explanation for the discrepancy except to indicate that "maybe" he was on a leave of absence (C.A. App. 873).

5. On September 28, 1983, the district court issued a written decision holding that the government had not established any basis for revoking petitioner's citizenship (Pet. App. 39a-137a). The court ruled, first, that petitioner's citizenship had not been "illegally procured" within the meaning of 8 U.S.C. 1451(a) (Pet. App. 122a-124a). Having excluded the government's evidence of the atrocities at Kedainiai to the extent that the evidence implicated petitioner, the court found that the government had failed to prove by clear and convincing evidence that petitioner had participated in those atrocities (*id.* at 122a-123a).¹³ Second, the district court ruled that peti-

¹³ The court found, contrary to petitioner's testimony, that petitioner did not leave Kedainiai until October 1941 (Pet. App. 111a). It noted (*ibid.*) that "[i]f there were admissible evidence tending

tioner's citizenship was not "procured by concealment of a material fact or by willful misrepresentation" within the meaning of 8 U.S.C. 1451 (a). Notwithstanding petitioner's repeated false statements in the course of obtaining his citizenship, the court held that those false statements were not "material" as that term was construed in *Chaunt v. United States*, 364 U.S. 350 (1960), and in the separate opinions in *Fedorenko v. United States*, 449 U.S. 490 (1981) (Pet. App. 124a-137a). The court determined that none of the true facts, if known, would have warranted the denial of citizenship or would have made petitioner ineligible for a visa (*id.* at 135a). In addition, the court concluded (*id.* at 136a-137a) that disclosure of the true facts in petitioner's visa application would not have prompted an investigation by American consular officials.¹⁴ Accordingly, the court entered judgment for petitioner.

6. The court of appeals reversed (Pet. App. 1a-37a). It found it unnecessary to decide whether the deposition evidence linking petitioner to the Kedainiai murders was erroneously excluded (*id.* at 6a. & n.2)¹⁵ because it held that petitioner's misrepresentations were material under

to show that defendant played a part in the killings in Kedainiai in July and August 1941, the falseness of defendant's testimony that he was in Kaunas during those months would tend to corroborate the evidence of his complicity in the killings." However, because the deposition testimony was not admitted against petitioner with respect to his role in the atrocities, the court considered petitioner's false testimony as to when he left Kedainiai only for general credibility purposes (*ibid.*).

¹⁴ The court did not consider whether, if petitioner had told the truth at any point during the visa or naturalization process, the discrepancies created by his prior false testimony and documents would have been material. In addition, since it found that no investigation would have occurred, the court did not consider whether an investigation would (or might) have uncovered facts justifying a denial of a visa application or a citizenship petition (Pet. App. 136a-137a).

¹⁵ The court nonetheless indicated that it "reject[ed] the suggestion that all depositions taken in the Soviet Union should be automatically excluded from evidence" (Pet. App. 6a n.2).

its construction of the standards set forth in *Chaunt* (*id.* at 8a-23a, 28a-37a). Relying on the testimony of former Vice Consul Finger, the court concluded (*id.* at 29a) that in light of the falsified documents previously submitted by petitioner, an investigation would have been conducted into petitioner's background if he had truthfully stated his correct date and place of birth when he was later interviewed under oath by the vice consul. The investigation, the court explained, probably would have revealed that petitioner had not been a victim of persecution (*ibid.*).¹⁶ That status, the court noted, was necessary to obtain a nonpreference visa at the time and place in question (*id.* at 30a-33a). The court also concluded that if petitioner had told the truth in the course of his naturalization proceedings, the discrepancies between those truthful statements and his misrepresentations at the visa stage would have resulted in either an outright denial of the petition or a field investigation, which probably would have shown that petitioner was ineligible for a visa in the first place because he was not a victim of persecution (*id.* at 36a). Thus, the court reasoned (*id.* at 37a), petitioner's false statements were material regardless of whether the focus of inquiry was the visa stage or the naturalization stage.

SUMMARY OF ARGUMENT

I

A. Under 8 U.S.C. 1451(a), citizenship must be revoked if it was procured on the basis of a misrepresentation or concealment of a material fact. In *Chaunt v. United States*, *supra*, this Court held that a concealed or misrepresented fact is material if either (1) the fact, if disclosed, would have warranted denial of citizenship, or (2) "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (364 U.S. at 355).

¹⁶ The court did not decide whether materiality would be established if the government could show only that the investigation "possibly" would have revealed disqualifying facts (Pet. App. 22a).

The first *Chaunt* test requires the government to prove that a misrepresented or concealed fact would have definitely resulted in denial of a visa or citizenship. The second *Chaunt* test, however, does not require proof of the existence of ultimate disqualifying facts. Rather, as the Court's formulation indicates, it is sufficient if the government proves that there *would* have been an investigation and that such an investigation *might* have uncovered disqualifying facts.

Petitioner disputes our interpretation of the second *Chaunt* test. He maintains that proof of ultimate disqualifying facts is required under either test. Under petitioner's approach, however, a visa or citizenship applicant would have everything to gain and nothing to lose by lying about his background in an effort to avoid an investigation into his past. Even if the lie is later discovered, the passage of time will make it more difficult for the government to prove ultimate disqualifying facts. Moreover, at the denaturalization stage, the burden of proof shifts from the citizen to the government.

Petitioner's proposed standard also ignores this Court's recognition that truthful information must be obtained from citizenship applicants if the system for admitting and naturalizing immigrants is to function properly (*Chaunt*, 364 U.S. at 352-353). In addition, petitioner's standard would undermine Congress's intent in enacting the denaturalization statute. In Section 1451(a), Congress specified that denaturalization is required for *either* illegal procurement *or* procurement based on material misrepresentation. Petitioner's interpretation of the second *Chaunt* test would render the misrepresentation basis for denaturalization meaningless, since the government would have to show in every case that the visa or citizenship was illegally procured—i.e., that the applicant lacked a necessary prerequisite for a visa or citizenship.

Petitioner's proposed standard would also create the anomaly of requiring a higher standard of materiality for denaturalization than for criminal prosecution. Numerous statutes (e.g., 18 U.S.C. 1001, 1621) provide criminal penalties for making material false statements.

The standard of materiality under those statutes is simply that the statement have a natural tendency to influence, or be capable of influencing, the tribunal or government official.

B. Under the appropriate legal standard (and, indeed, even under petitioner's standard), petitioner's misrepresentations and concealments were material. Petitioner repeatedly misrepresented and concealed his true date of birth, place of birth, wartime residence, and wartime occupation. The testimony at trial established that if petitioner's false statements and concealments had come to light at either the visa or naturalization stage, an investigation would have occurred. Moreover, as a result of such an investigation, petitioner's visa or citizenship petition would have (or at least might have) been denied for at least four reasons. First, had petitioner given truthful information when he was interviewed under oath by the vice consul, his visa would have been denied because of his prior submission of false documents. Second, his visa or citizenship application probably would have been denied on the ground that he was not a victim of Nazi persecution and therefore was ineligible for a visa under the policies at the Stuttgart consulate in 1947. Third, petitioner's citizenship application probably would have been denied on the ground that, in light of his repeated lies under oath, he lacked the requisite good moral character. Fourth, petitioner's visa or citizenship application might have been denied because it might have led to the discovery of evidence inculcating him in the atrocities against innocent civilians in Kedainiai in July and August 1941.

II.

Petitioner's denaturalization is required for yet another reason. A necessary prerequisite to citizenship is that the applicant be of good moral character (8 U.S.C. 1427(a)). Congress specifically provided by statute (8 U.S.C. 1101(f)(6)) that a person is not of good moral character if he "has given false testimony for the purpose of obtaining benefits" under the immigration and

naturalization laws. A person who has obtained his citizenship without the requisite moral character has procured that citizenship illegally and is therefore subject to denaturalization under 8 U.S.C. 1451(a).

In the present case, petitioner repeatedly gave false testimony under oath. In addition, he submitted falsified documents to immigration officials and withheld documents containing the true information. It is also clear that petitioner's only conceivable reason for lying to government officials was to prevent an investigation into his past. Even today, petitioner can provide no logical explanation of why he lied to American officials about his date and place of birth, yet gave truthful information to the Germans. Nor can he explain why he lied about his wartime occupation. Most significantly, petitioner cannot explain why he falsely maintained that he did not live in Kedainiai during the months of July and August 1941, when thousands of civilians were killed there by the Nazis with the assistance of a Lithuanian paramilitary organization to which petitioner belonged. Petitioner's conduct, which could have formed a basis for criminal prosecution, demonstrated a lack of good moral character. His citizenship was therefore illegally procured.

ARGUMENT

I. PETITIONER'S MISREPRESENTATIONS WERE MATERIAL UNDER 8 U.S.C. 1451(a)

A. A Misrepresentation Is Material If Disclosure Of The Truth Would Have Led To An Investigation That Might Have Uncovered Facts Warranting Denial Of A Visa Or Citizenship

This Court has long recognized that citizenship is a "precious" right (*Fedorenko*, 449 U.S. at 505). For that reason, the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship" (*ibid.* (quoting *Costello v. United States*, 365 U.S. 265, 269 (1961))). The government's evidence must be clear, unequivocal, and convincing, and not leave

"the issue in doubt" (*Schneiderman v. United States*, 320 U.S. 118, 125 (1943)). At the same time, however, the Court has recognized that "[a]cquisition of American citizenship is a solemn affair" and that "[c]omplete replies [to officials] are essential so that the qualifications of the applicant or his lack of them may be ascertained" (*Chaunt*, 364 U.S. at 352). Accordingly, "[f]ull and truthful response to all relevant questions required by the naturalization procedure is . . . to be exacted, and temporizing with the truth must be vigorously discouraged" (*ibid.*). The Court has also made clear that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with," and it has recognized the government's right to challenge [a naturalization order] . . . and demand its cancellation "unless issued in accordance with such requirements" (*United States v. Ginsberg*, 243 U.S. 472, 475 (1917); see also *Fedorenko*, 449 U.S. at 506).

Section 340(a) of the 1952 Act, as amended, -8 U.S.C. 1451(a), provides that a naturalized person's citizenship may be canceled if the government can establish that his citizenship was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation."¹⁷ Petitioner does not dispute that throughout the visa and naturalization process, he repeatedly misrepresented and concealed his true date of birth, place of birth, wartime residence, and wartime occupation.¹⁸ Notwithstanding the government's un rebutted evidence (J.A. 199-201) that if those lies had been exposed petitioner would never have obtained a visa in the first place, petitioner maintains (Pet. Br. 9-28) that his lies under

¹⁷ Although the statute speaks in terms of "willful misrepresentation" or "concealment of a material fact," the Court has indicated that concealments must also be willful and misrepresentations must also be material (*Fedorenko*, 449 U.S. at 507-508 n.28).

¹⁸ In his brief, petitioner repeatedly focuses only on the falsehoods regarding the date and place of his birth; he gives only the briefest mention to the falsehoods regarding his wartime residences and occupations.

oath and his submission of falsified documents to United States government officials were not "material" and therefore cannot provide the basis for his denaturalization. As we explain below, Congress could not have intended, and this Court's decisions in no way hold, that a person who has so totally disregarded the requirements for obtaining benefits under the immigration laws should be entitled to retain his citizenship.

1. The leading case on materiality under Section 1451(a) is *Chaunt v. United States*, *supra*. Petitioner contends (Pet. Br. 9-20) that the Court in *Chaunt* established only one test for determining materiality and that the two prongs articulated in that opinion require essentially the same showing—that the applicant necessarily would have been disqualified from citizenship (or from obtaining a visa) if the government had received truthful and complete answers to its questions. But *Chaunt* by its terms did just the opposite: it set forth two alternative tests for materiality, only one of which required proof of ultimate disqualifying facts.

The government in the *Chaunt* case had sought to denaturalize a citizen because he had concealed, in his 1940 citizenship application, three arrests in 1929 and 1930 for handbilling, illegal demonstration, and breach of the peace. The statute in effect at the time¹⁹ provided that an applicant for citizenship must have behaved as a person of good moral character during the previous five years. Although the arrests were more than five years old, the government argued that if it had known of those arrests, it would have conducted an investigation and would have learned of Chaunt's position as a Communist Party official, an affiliation that presumably would have disqualified him from citizenship.

This Court reversed the district court's order revoking citizenship. At the outset, the Court explained that "[f]ailure to give frank, honest, and unequivocal an-

¹⁹ Section 4 of the Naturalization Act of 1906, ch. 3592, 34 Stat. 596-598, as amended by Act of Mar. 2, 1929, ch. 536, § 6, 45 Stat. 1513-1514 (now 8 U.S.C. 1427(a)).

swers * * * is a serious matter" because "[s]uppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. *Or disclosure of the true facts might have led to the discovery of other facts which justify denial of citizenship.*" 364 U.S. at 352-353 (emphasis added). The Court then went on to reject the government's contention that truthful answers from Chaunt would have prompted an investigation that might have revealed that Chaunt was a Communist Party official in 1929. It noted (*id.* at 355) that the government was aware of other possible indicia of Communist Party affiliation, such as his membership in the International Workers' Order (IWO), which the Court assumed to be a Communist organization. Yet Chaunt's disclosure of his IWO membership had not prompted an investigation into his political affiliations. The Court was unwilling to believe that the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations" was really material in light of the government's inaction when faced with more substantial evidence of the same affiliation (*ibid.*).

The Court emphasized, however, that a different case would have been presented if the arrests had involved "moral turpitude or acts directed at the Government, [or] conduct which even peripherally touched types of activity which might disqualify one from citizenship" (364 U.S. at 354). It also indicated that if Chaunt had not disclosed his IWO affiliation, the "failure to report the arrests would have had greater significance," because a forceful argument could then be made that his failure to disclose the arrests was "part and parcel of a project to conceal a Communist Party affiliation" (*id.* at 355). On the facts before it, however, the Court concluded that the government had failed to show "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) *that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship*" (*ibid.* (emphasis added))).

As the quoted language reveals, the Court in *Chaunt* established two alternative tests for determining the materiality of misrepresentations or concealments, and proof of disqualifying facts is not required under the second test.²⁰ Although the Court's language is not entirely free of ambiguity, we submit that under the second prong, denaturalization is authorized for misrepresentations even though truthful answers regarding the misrepresented facts would not necessarily have required that result but simply might have required it.

Our interpretation of *Chaunt* is consistent with the established rule prior to *Chaunt*, which *Chaunt* did not purport to disturb. Thus, in cases that discussed the materiality requirement prior to *Chaunt*, the courts did not require proof of ultimate disqualifying facts. See, e.g., *Corrado v. United States*, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956) (noting that "the issue [was] not whether naturalization would have been denied . . . but whether, by his false answers, the Government was denied the opportunity of investigating [his] moral character . . . and the facts relating to his eligibility for citizenship"); *United States v. Montalbano*, 236 F.2d 757, 759-760 (3d Cir.), cert. denied, 352 U.S. 952 (1956); *Granduze y Marino v. Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), aff'd, 278 F.2d 330 (2d Cir.), cert. denied, 364 U.S. 824 (1960); *United States v. Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States v. Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955), aff'd, 232 F.2d 216 (9th Cir. 1956).

This Court has never reconsidered the language in *Chaunt* establishing the two tests for materiality. In *Fedorenko v. United States*, *supra*, the Court found it unnecessary to decide whether the court of appeals was

²⁰ Indeed, petitioner apparently concedes (Pet. 8) that the literal language of the second *Chaunt* test supports the interpretation we propose. The leading immigration law treatise also concurs in our reading of *Chaunt*. See 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 20.4h, at 20-14 (1986).

correct when it applied the same materiality test that we urge here. The defendant in that case had served as an armed guard at the Treblinka concentration camp. Because those activities would have made petitioner ineligible for a visa as a matter of law under the Displaced Persons Act of 1948 (DP Act), Pub L. No. 80-774, ch. 647, 62 Stat. 1009 *et seq.*, regardless of whether his service was voluntary or involuntary, the Court concluded that his misrepresentations about his wartime activities were material and warranted his denaturalization.²¹ See also *Costello v. United States*, *supra* (upholding denaturalization of applicant who concealed occupation as a bootlegger; Court resolved case under first *Chaunt* test and therefore did not construe the second test).

Most of the lower court decisions since *Chaunt* have agreed with us that the government need not establish some ultimate disqualifying fact in order for a misrepresentation to be material. For example, in *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.) (Marshall, J.), cert. denied, 375 U.S. 833 (1963), the court noted that the failure to disclose a record of prior arrests was material, "even though none of those arrests by itself would be a sufficient ground for denial of naturalization," because the concealment "closes to the Government

²¹ Three members of the Court wrote separately in *Fedorenko* to express their understanding of *Chaunt*. Justice Blackmun, in a concurring opinion, concluded that even under the second test in *Chaunt*, the government must establish some ultimate disqualifying fact in order for the misrepresentation at issue to be material. 449 U.S. at 518-526. Justice Stevens, in dissent, concluded that the *Chaunt* test requires proof that a truthful answer would have led to an investigation and that a disqualifying circumstance actually existed. If the government could establish the existence of a disqualifying fact, according to Justice Stevens, it would be entitled to a presumption that an investigation begun at the time would have disclosed that fact. 449 U.S. at 530-538. Justice White, also in dissent, rejected the view that the second *Chaunt* test requires proof of ultimate disqualifying facts. His view was that it is enough if the government can show that a visa "might" have been denied as a result of an investigation. 449 U.S. at 526-530.

an avenue of inquiry which might conceivably lead to collateral information of greater relevance." Accord, e.g., *United States v. Palciauskas*, 734 F.2d 625 (11th Cir. 1985); *United States v. Kociy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984); *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966) (adopting an even more lenient test for materiality, requiring the government to show only that the disclosure might have led to an investigation that might have resulted in the denial of citizenship); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). Contra, *United States v. Sheshtaury*, 714 F.2d 1038 (10th Cir. 1983); see also *La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974).²²

2. We submit that our interpretation of the materiality test best balances the two important competing interests: the naturalized person's strong interest in retaining his citizenship and the government's equally strong interest in ensuring that visa and citizenship applicants provide truthful information. As the lower courts both before and after *Chaunt* have recognized, a materiality standard of the sort suggested by petitioner would seriously interfere with the enforcement of the immigration laws.

A standard requiring proof that the applicant would have been denied entry or citizenship if he had answered truthfully gives the applicant every incentive to conceal information when he believes that the information could adversely affect his visa application or naturalization petition. *Fedorenko*, 449 U.S. at 529 (White, J., dissent-

²² The Attorney General, who is charged with the administration of the immigration laws and whose rulings on questions of law are controlling within the Executive Branch under 8 U.S.C. 1103(a), has also read *Chaunt* to sanction denaturalization even in the absence of proof of ultimate disqualifying facts. He issued a ruling in that regard (in the deportation context) shortly after *Chaunt* was decided. See *In re S- and B-C-*, 9 I. & N. Dec. 444, 447 (1961) (the government may satisfy the materiality requirement either by proving ultimate disqualifying facts or by showing that the misrepresentation "tend[ed] to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded").

ing). In many cases, the lie will never be discovered, and the applicant will retain his fraudulently obtained citizenship without a challenge. Even if his deception is eventually uncovered, the applicant is better off in at least two ways for having lied. First, the passage of time invariably makes it more difficult for the government to uncover disqualifying facts. Essential witnesses may have died and memories will have faded. Second, the burden of proof shifts to the government. At the time he applies for citizenship, the applicant bears the burden of "show[ing] his eligibility for citizenship in every respect" (*Berenyi v. District Director*, 385 U.S. 630, 637 (1967)). At the denaturalization stage, however, the government can prevail only if it establishes proof of ineligibility by clear, unequivocal, and convincing evidence (*Schneiderman*, 320 U.S. at 125, 158). Anyone with even the slightest fear that something in his past might disqualify him from citizenship would therefore have every incentive to lie about his past and to provide false biographical information.

3. In addition to being contrary to the policy of the immigration laws, petitioner's interpretation of the materiality requirement is inconsistent with both the language of Section 1451(a) and its legislative history. Section 1451(a) provides two separate grounds for denaturalization: (1) illegal procurement and (2) willful concealment or misrepresentation of a material fact. Citizenship is illegally procured if a necessary prerequisite to naturalization is absent at the time the petition for naturalization is granted. *Fedorenko*, 449 U.S. at 506, 515. Yet to establish facts warranting denial of citizenship, as petitioner's proposed standard would require, the government would have to prove that at the time he applied for citizenship, the individual lacked some essential prerequisite for naturalization—the same proof that is required to show illegal procurement. If, in order to establish a material misrepresentation, the government must first make a showing sufficient to prove illegal procurement, then the misrepresentation provision of the statute is wholly redundant. Put another way, if

individuals may be denaturalized only when it is shown that they were ineligible for citizenship in the first place, then their behavior in making misrepresentations during the naturalization process, no matter how egregious, is of no separate significance for denaturalization purposes. Petitioner's interpretation thus would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Moreover, petitioner's standard conflicts with the legislative history of Section 1451(a), which demonstrates a firm congressional intent to use the denaturalization process to discourage false statements by visa and citizenship applicants. Before 1952, the predecessor to Section 1451(a) provided that a naturalization certificate could be revoked either because the certificate was "illegally procured" or "on the ground of fraud." 8 U.S.C. (1940 ed.) 738(a). The Senate Judiciary Committee in 1950 pointed out that litigation over extrinsic versus intrinsic fraud had hampered the prosecution of denaturalization cases. See S. Rep. 1515, 80th Cong., 1st Sess. 755-758 (1950). The committee therefore recommended that the denaturalization provision include a false statement provision in place of the reference to fraud because "proof of 'concealment of a material fact or * * * willful misrepresentation' is more easily proved than is an allegation of fraud and illegality." *Id.* at 769. The 1952 Act adopted the Senate Committee's proposal. See S. Rep. 1137, 82d Cong., 2d Sess. 45 (1952). By rendering the "misrepresentation" provision redundant, petitioner's proposed standard of materiality would therefore be squarely contrary to the congressional purpose of expanding the grounds for denaturalization, which was the reason for including the misrepresentation provision in the 1952 Act.

4. Petitioner's proposal would also result in the anomaly that the standard for materiality in the denaturalization setting would be more exacting than the standard in a criminal prosecution for perjury or false state-

ments. Petitioner has pointed to nothing in the legislative history or policies underlying the immigration laws to suggest that Congress could have intended such a result.

Congress's failure to provide any definition of "materiality" in Section 1451(a) suggests that the word should be given its ordinary meaning. See, *e.g.*, *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Numerous criminal statutes contain materiality requirements,²³ and the meaning of materiality in the criminal context is both well settled and consistent with the interpretation we propose.

Because of its investigative function, the grand jury performs a role analogous to that of the vice consul or naturalization examiner in reviewing an application for a visa or for citizenship. A false statement before a grand jury is material if it is "capable of influencing the tribunal" or if it "would have the natural effect or tendency to influence, impede, or dissuade the Grand Jury from pursuing its investigation." *United States v. Gremillion*, 464 F.2d 901, 905 (5th Cir.) (emphasis added), cert. denied, 409 U.S. 1085 (1972). Moreover, because the purpose of the grand jury's investigation is a factfinding one, "leads to additional facts may be material even though they do not reflect on the ultimate issue being investigated." *United States v. Lardieri*, 497 F.2d 317, 319 (3d Cir. 1974).

Various criminal statutes penalize false statements to government officials, including immigration authorities. The materiality standard under those statutes does not require a showing that disclosure of the true facts would necessarily have led to a different result. For example, the general federal false statements statute, 18 U.S.C. 1001, provides that it is a crime to make a false state-

²³ *E.g.*, 18 U.S.C. 1621 (false statement under oath as to a "material matter"); 18 U.S.C. 1623 (false "material declaration" before a court or grand jury); and 18 U.S.C. 1001 (concealment of a "material fact" in a matter within the jurisdiction of a department or agency of the United States).

ment or use a false document jurisdiction of any department of the United States.”²⁴ In *United States v. Lopez* (11th Cir. 1984), the defendant was convicted of violating Section 1001 by giving a false date of birth and using a false passport. The court explained that a document is material under Section 1001 if it “has influence, or [is] capable of affecting the operation of government function” (725 F.2d at 729). The court rejected the defendant’s argument that the false information was not material, concluding that the false information was material to the agency’s decision to issue a passport application” (*ibid.*). In *United States v. Lopez*, 728 F.2d 1359, 1363 (11th Cir. 1984), the court emphasized in original; citation order under Section 1001 for false statements, court noted that “[i]t is not necessary that a specific falsification did not exist; it is enough that the defendant had the *capacity* to do so”); *United States v. Lopez*, 728 F.2d 725, 729 (9th Cir. 1984). In *United States v. Lopez*, Section 1001 for submitting false information to United States consular officials because the letters “were sent to consulate authorities in the United States for granting immigrant visas to the defendant to come a public charge”); *Tzong v. United States*, 402 F.2d 163, 168 (9th Cir. 1968) (court noted in Section 1001 that the defendant’s statements to immigration officials were material if it *could* affect or influence the operation of governmental function”), *see also* *United States v. Lopez* (1969); *Robles v. United States*, 300 F.2d 100 (9th Cir. 1960) (in prosecution under Section 1001 for submitting falsified documents to

²⁴ This provision applies to misstatements to the United States government. See *United States v. Lopez*, 503 U.S. 503, 505 (1995).

"in any matter within the
or agency of the United
v. Ramos, 725 F.2d 1322
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Accord, *e.g.*, *United States*
2 (11th Cir. 1984) (em-
itted) (in prosecution un-
ements to immigration offi-
makes no difference that a
ert influence so long as it
United States v. Valdez, 594
9) (in prosecution under
false letters of employment
cials, court upheld convic-
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Antarmas v. United States,
1968) (emphasis added)
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United States v. Bramblett, 348

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noted that the test is whether a false statement has a natural tendency to influence the decision of the U.S. 836 (1961).

In addition, visa applications are made under oath to consular officers. Under the general perjury statute, *e.g.*, *United States v. Flores*, 358 U.S. 136 (1958) (false statement to obtain visa), the materiality test in such cases might have induced an investigation which might result in a refusal of the visa" (*id.* at 137-138 (cases)).²⁵

There is no reason to assume that the Government would adopt a more stringent standard than that in 8 U.S.C. 1451(a) than under the current law. Petitioner's position would be that a person who procures a visa by means of a false representation would be immune from denaturalization unless the Government proved, yet would be subject to deportation, including imprisonment, for the

²⁵ Another criminal statute, 18 U.S.C. 1546, makes it a crime to possess or receive an illegal alien who has been procured by means of any false statement. 18 U.S.C. 1546 likewise does not require proof that the false statement was material. See *United States v. Al-Kurna*, No. 82-1011 (S.D.N.Y. 1982). In *United States v. Wiggan*, 673 F.2d 1011 (9th Cir. 1982), the court applied the congressional policy promoted by the disclosure about facts deemed relevant. Applying that standard, the court held that a false statement on a visa application about whether the applicant was an illegal alien was material, even if the visa application was completed, the deportation in question was not final. See also 18 U.S.C. 1015(c) (under oath "in any case, proceeding or by virtue of any law of the United States [or] citizenship").

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capable of influencing the agency.
86-3402 (5th Cir. Jan. 15, 1987).
F.2d 145 (6th Cir.), cert. denied,
noted (*id.* at 147) that "the Con-
ection 1546 is a full and honest
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tion. Petitioner has cited no authority—and we know of none—to support the proposition that the loss of citizenship, as precious as that right may be, is entitled to greater protection than the loss of liberty accompanying a criminal conviction. To the contrary, the courts in denaturalization cases have consistently treated the criminal standard as the *maximum* standard against which to set standards for denaturalization. See, e.g., *Schneiderman*, 320 U.S. at 160 (“A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status.”).

5. In *Fedorenko*, this Court raised but did not resolve the issue whether the *Chaunt* standard for materiality governing misrepresentations at the naturalization stage should also apply to misrepresentations made at the visa stage, the point at which petitioner made his first false statements (449 U.S. at 508-509). We know of no court that has applied a different standard at the visa stage than at the naturalization stage,²⁶ and we submit that the reasons for adopting our proposed materiality standard apply *a fortiori* at the visa stage.

The need for a standard that encourages honesty and full disclosure is greatest at the visa stage. Under the 1952 Act, as under the 1924 Act, the inquiry undertaken by a consular officer is wide-ranging. When a vice consul inquires into an alien's eligibility for a visa, that inquiry covers virtually every phase of the alien's life.²⁷ Additional complications arise out of the locale of the consulate at which the application is made. Relations

²⁶ See *Maikovskis v. INS*, 773 F.2d 433, 441 (2d Cir. 1985) (citing numerous authorities applying *Chaunt* test in context of visa misrepresentations), cert. denied, No. 85-1483 (June 16, 1986).

²⁷ The 33 separate categories of ineligibility for aliens seeking a visa require a vice consul to inquire, *inter alia*, into the alien's mental and physical health (8 U.S.C. (& Supp. III) 1182(a)(1)-(7)); financial stability (8 U.S.C. 1182(a)(8) and (15)); marital status (8 U.S.C. 1182(a)(11)); political views (8 U.S.C. 1182(a)(27)-(29)); and service on behalf of the regime of Nazi Germany (8 U.S.C. 1182(a)(33)).

between the United States and the alien's country may range from cordial to hostile. A vice consul may not have access in a foreign country to evidence, such as official documents or witnesses, that is necessary to verify the facts offered by an applicant. Because a vice consul lacks the time and resources to undertake an exhaustive inquiry into each applicant's bona fides, he must place considerable reliance on an applicant's statements and credibility. Moreover, an applicant's incentive to lie is greatest at the visa stage, since there is virtually no judicial review of decisions denying visas. See, *e.g.*, *Ventura-Escamilla v. INS*, 647 F.2d 28, 31 (9th Cir. 1981) (citing authorities). All of these factors highlight the importance of requiring a visa applicant to be completely truthful when applying to enter this country. It follows that the government should not be required to show that a misrepresentation at the visa stage *would* have uncovered a fact warranting denial of the visa but only that an investigation *might* have uncovered such a fact.

B. Petitioner's Misrepresentations Were Material Under Any Standard

1. *Discovery of the True Facts Would Have Led to an Investigation*

Former Vice Consul Finger, who processed visa applications in Stuttgart at the time petitioner submitted his application there, testified that information relating to an applicant's identity and wartime activities was reviewed with special care (J.A. 189, 198-199). That procedure was required because, in addition to the normal quota requirements, the American consulate in Stuttgart was issuing visas only to persons who had immediate relatives living in the United States and those who could prove they had been victims of Nazi persecution (J.A. 187, 197, 213-214, 217-218). Had petitioner been truthful with the consular officials at the visa stage when he was questioned under oath, an investigation clearly would have ensued because the officials would have dis-

covered the discrepancy between his truthful statements at that time and his previously submitted falsified documents. As the court of appeals noted (Pet. App. 31a), Finger gave "unrebutted testimony" concerning what would happen if there were discrepancies between the supporting documents and the visa application. Finger specifically testified that if an applicant gave information in his application or during his interview that was inconsistent with information in his supporting documents, an investigation "certainly would have" been conducted (J.A. 199-200). In fact, such an investigation was mandated by regulations that were in effect at the time (22 C.F.R. 61.329 (1946); see Pet. App. 31a).

According to Finger, the vice consul "would first check police records in any prior places of residence, particularly in Germany where such records were available" (J.A. 199). He would also check lists of rejected visa applicants and might make inquiries of the sponsoring agencies (*ibid.*). In addition, he might interview individuals in displaced persons camps (J.A. 212) and other individuals who knew the applicant (J.A. 212-213).

A field investigation may not even have been necessary, since it appears that the discovery of discrepancies between petitioner's statements to the vice consul and his falsified documents would have resulted in denial of his visa even without an investigation. Finger's testimony (J.A. 199-204) revealed that if an applicant gave conflicting information about his date and place of birth, wartime occupation, or wartime residence, his visa application would simply be denied outright.²⁸ Based on

²⁸ Finger's testimony is supported by several court decisions rendered prior to 1947 holding that misrepresentations as to identity were material *per se* to visa and naturalization decisions. See, e.g., *McCandless v. United States ex rel. Murphy*, 47 F.2d 1072 (3d Cir. 1931); *In re Zychole*, 43 F.2d 438 (E.D. Mich. 1930); *United States v. Shapiro*, 43 F. Supp. 927, 930 (S.D. Cal. 1942); *United States v. Goldstein*, 30 F. Supp. 771, 773 (E.D.N.Y. 1939); see also *United States ex rel. Karpay v. Uhl*, 70 F.2d 792 (2d Cir.), cert. denied, 293 U.S. 573 (1934) (making false statements concerning marital status under oath in a naturalization proceeding con-

that evidence, the government established materiality even under the first prong of *Chauat*.

Similarly, if petitioner had perpetuated his false identity throughout the visa stage but disclosed the true facts at the naturalization stage, there would, at a minimum, have been an investigation. As the court of appeals noted, the undisputed testimony of petitioner's naturalization examiner, former Immigration Judge Goldberg, revealed that if petitioner had told the truth when he applied for citizenship, "the discrepancies between the truth and his visa materials would have resulted in either a field investigation or an outright denial of the petition" (Pet. App. 36a). See J.A. 169-171 (testimony of Judge Goldberg).²⁰

Faced with unrebutted testimony that his truthful testimony would have triggered an investigation—or outright denial of a visa or citizenship application—because of the discrepancies that would have been revealed, petitioner argues (Pet. Br. 13-14) that in assessing materiality at any particular point in time, a court must presume a clean slate and must hypothesize that no prior false statements were ever made. According to petitioner, the issue is whether being born in 1915 rather

stitutes crime of moral turpitude warranting deportation). Since that time, misrepresentations regarding identity have continued to be considered highly material to visa or citizenship determinations. See *United States v. DeLucia*, 256 F.2d 487, 490 (7th Cir.), cert. denied, 358 U.S. 836 (1958); *London v. Clarke*, 239 F.2d 631, 634 (1st Cir. 1956); see also *United States v. D'Agostino*, 338 F.2d 490, 491 (2d Cir. 1964); 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 4.7c, at 4-62 (1986) (concealment of identity "usually has been deemed material since identity is crucial to the application for entry and deception frustrates inquiry"). Congress has clearly indicated the importance it places on facts going to identity; both Section 7 of the 1924 Act and Section 1202 of the current statute specifically require applicants for visas to provide accurate biographical data, including date and place of birth.

²⁰ Despite extensive testimony by Judge Goldberg in this regard, the district court failed to consider whether, if petitioner had told the truth at the naturalization stage, after having lied at the visa stage, an investigation would have occurred.

than in 1913 or in Reistru rather than Kaunas would have made him ineligible *per se*, not whether discrepancies concerning his asserted date or place of birth would have been important (*ibid.*). But the issue cannot be analyzed in a vacuum; to do so would be to ignore the realities of the visa and citizenship procedures, as described by both Finger and Goldberg. As those officials explained, a truthful statement about a fact as fundamental as date or place of birth can take on great importance when it conflicts with the person's prior statements or with his previously submitted documents.⁸⁰ Petitioner should not be allowed to rewrite the record by asking a court to assume that he made no previous false statements and that he submitted no falsified documents.⁸¹

More fundamentally, petitioner's approach, taken to its logical conclusion, leads to the absurd result that a visa or citizenship applicant could adopt and maintain throughout the process a totally false identity, including a fictitious date of birth, place of birth, residence, occupation, and even a fictitious name. Under petitioner's

⁸⁰ Indeed, under Section 7(c) of the 1924 Act and the applicable regulations (22 C.F.R. 61.327(e), (f), and (g) (1946)), petitioner should have supplied to consular officials all the documents in his possession or available to him going to his identity. Had he provided all such documents there would have been obvious discrepancies even among the documents themselves.

⁸¹ Petitioner suggests (Pet. Br. 14) that his approach is correct because someone who is going to tell the truth "obviously" would do so consistently throughout the proceedings. But this point is anything but obvious; a witness may well decide to tell the truth, notwithstanding his previous submission of false documents, when he is forced to testify under oath. Alternatively, he may be careless in looking over his falsified documents, or he may simply have forgotten the exact content of his prior lies. In this regard, we note that during his interview under oath with government attorneys in 1981, petitioner gave two completely different accounts about whether he had previously lied about his date and place of birth. See pages 9-10, *supra*; *United States v. D'Agostino*, 338 F.2d 490 (2d Cir. 1964) (inconsistent statements to naturalization officials concerning marital status).

theory, he would face no risk of denaturalization unless the government could show, decades later, that his true name, date of birth, residence, and occupation would per se have disqualified him.²² As a practical matter, this would mean that an applicant for a visa or for citizenship could assume a totally false identity with impunity and thereby ensure that the authorities would be unable to investigate his past. But as this Court has stated (*Berenyi v. District Director*, 385 U.S. at 638), "[t]he Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised." Congress could not possibly have intended the approach urged by petitioner, in which a person who assumed a completely false identity could not be denaturalized.

The district court erroneously adopted petitioner's approach. According to that court, the issue was whether petitioner's birth in 1915 in Reistru, his residence in Kedainiai during 1940-1942, or his employment at a small factory were "facts which, if known, would have warranted denial of citizenship" (Pet. App. 135a). The court concluded (*id.* at 136a) that there was nothing that would "excite suspicion" in the fact that defendant had those particular biographical attributes.

By focusing only on the false statements themselves, the district court asked the wrong question in assessing whether the true facts would have provoked an investigation. The court of appeals, by contrast, asked the correct question, namely, whether discrepancies between true information on petitioner's visa application and the misrepresentations in his falsified documents would have resulted in an investigation by the consular officials (Pet. App. 29a). At the naturalization stage, as the court of

²² As petitioner suggests (Pet. Br. 7), disqualification would ordinarily be possible only if a person lied about his country of birth and thereby became eligible under a different country's quota when he would not have been eligible under the quota applicable to his own country.

appeals likewise recognized (*id.* at 36a), the correct question is whether truthful information by petitioner on these basic matters, in the face of inconsistent information at the visa stage, would have triggered an investigation by the naturalization examiner. Under this analysis, the answer is clear: there would, at a minimum, have been an investigation at both the visa and naturalization stages if petitioner had revealed the truth and had thereby contradicted his prior false statements.

Because the district court applied an erroneous legal analysis, there is no merit to petitioner's contention (Pet. 14-15; Pet. Br. 5, 8-9, 28-30) that the Third Circuit improperly engaged in *de novo* review of the district court's finding that no investigation would have been conducted if petitioner had told the truth. The Third Circuit simply applied the correct legal analysis to the undisputed facts, as it is permitted to do. See, *e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

2. The Investigation Would Likely Have Led To the Discovery of Disqualifying Facts

Because the district court erroneously concluded that no investigation would have ensued as a result of petitioner's misrepresentations, it did not consider whether it was likely that an investigation would have led to the discovery of disqualifying facts (Pet. App. 134a-137a). The record demonstrates, however, that the government met its burden of proof under the "might" standard that we propose, under the "probable" standard applied by the court of appeals, and even under the "would" standard urged by petitioner.

a. The Investigation Would Have Resulted in the Denial of Petitioner's Visa Application Because of Falsified Information Concerning His Identity

Ambassador Finger's unrebutted testimony established that if an investigation had ensued, petitioner's visa would have been denied because of his misrepresentations concerning his identity (J.A. 200-202). Specifically, Fin-

ger testified that if a vice consul became aware that an applicant lied about his date and place of birth but prior to submitting his application had told the German authorities the truth about those matters, his visa would have been denied (J.A. 202). Similarly, if an applicant submitted falsified documents and withheld documents containing the true information, the visa would be denied (J.A. 200). Since the vice consul would have checked the German police records (J.A. 199) and made other pertinent inquiries (J.A. 199, 212), he clearly would have discovered, as the government did decades later, that petitioner had repeatedly given his correct biographical information (and documentation reflecting that information (J.A. 61-63)) to the German authorities. Based on his false statements and documents to American consular officials, petitioner's visa therefore would have been denied.

b. *The Investigation Probably Would Have Led to the Discovery of Facts Resulting in the Denial of Petitioner's Visa or Petition for Naturalization on the Ground that Petitioner was not a Victim of Persecution*

As the court of appeals noted (Pet. App. 30a), Ambassador Finger gave unequivocal testimony (see J.A. 187, 197, 205, 213-214, 217, 233) that the policy of the Stuttgart consulate was that visas were to be given only to those with close relatives in the United States and those who had been victims of Nazi persecution.⁵⁵ Finger, who served at Stuttgart at the time petitioner obtained his visa, had previously received training in processing visas at the State Department's Visa Division (J.A. 182-184). Since his testimony was based on his own firsthand knowl-

⁵⁵ Finger testified that such a policy was set forth in regulations (J.A. 218, 227-228). Although the district court noted that Finger was "in error on this point," the court recognized that "perhaps there was an informal policy at the Stuttgart consulate to prefer Nazi victims" (Pet. App. 119a-120a n.7). Petitioner misstates the record in suggesting (Pet. Br. 7, 16-17) that the district court rejected Finger's testimony concerning the policies for issuing visas in Stuttgart.

edge of the policies and practices at Stuttgart concerning visa eligibility, his testimony is entitled to great weight. See generally *Fedorenko*, 449 U.S. at 510-511.

Petitioner asserts (Pet. Br. 31-46) that Finger's recollection concerning the policies for issuing visas was erroneous. In fact, however, his testimony is confirmed by the legislative history of the DP Act, which took effect in June 1948, after petitioner applied for and obtained his visa. The DP Act was passed because emigres from areas such as the Baltic states, including Lithuania, had been unable to enter the United States under the stringent quota standards of the 1924 Immigration Act. See S. Rep. 950, 80th Cong., 2d Sess. 20-21, 24 (1948). Prior to the enactment of the DP Act, the quota immigrant visas for eastern European countries were going almost exclusively to Jews, persons who by definition were victims of Nazi persecution. See *id.* at 26; *Hearings on H.R. 2910 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 407 (1947); 94 Cong. Rec. 7861 (1948) (remarks of Rep. Lesinski).

In light of the fact that non-Jewish eastern European emigres were generally unable to obtain visas in 1947, petitioner cannot sustain his claim (Pet. Br. 31-38) that Finger simply fabricated the policy of the consulate in Stuttgart that nonpreference visa applicants had to establish that they had been victims of Nazi persecution. Finger was speaking accurately based on personal experience, and the Third Circuit properly relied on his testimony.

Indeed, petitioner's own conduct at the time he applied for a visa provides support for Finger's testimony. When applying for his visa, petitioner submitted a certificate issued by the central committee of the "Lithuanian Ex-Political Prisoners Nazi Victims" stating that he had been "persecuted by the gestapo" (J.A. 29).³⁴ If, as peti-

³⁴ Although the version reprinted in the Joint Appendix does not so reflect, the actual document submitted by petitioner was

tioner claims, there had been no requirement of proving persecution by the Nazis, such a certificate would have been unnecessary. Petitioner submitted several other fraudulent documents establishing his false date and place of birth (J.A. 27, 37, 38), so that the certificate certainly was not necessary as evidence of his identity. The only substantive fact addressed by the certificate was petitioner's purported underground activities and persecution by the Gestapo. Obviously, petitioner himself believed that establishing persecution by the Nazis was important to obtaining a visa. As the court of appeals noted (Pet. App. 31a), "by submitting this document [petitioner] attempted to prove that he was a victim of Nazi persecution."

Petitioner offers several grounds for challenging the court of appeals' reliance on Finger's testimony, but each lacks merit. First, petitioner relies (Pet. 21 n.12, 23; Pet. Br. 43) on remarks by Frank Schilling, the vice consul who actually processed petitioner's visa application, which purportedly conflict with Finger's statements. To begin with, petitioner fails to note that the remarks by Schilling were not testimony but were statements to petitioner's counsel over the telephone in a conversation to which neither the government nor the court was a party. More importantly, petitioner has quoted Schilling out of context and has distorted what Schilling actually said. Schilling repeatedly made clear that he had no

entitled "Nazi victims" and contained a stamp to that effect (C.A. Exh. 9). Petitioner's witness, Vydaudas Vidiekunas, the person who signed that document, conceded (C.A. App. 1106-1107) that the language of the document was misleading and should have indicated only that the subject faced a *risk* of persecution. Moreover, Vidiekunas had no personal knowledge that petitioner faced even that *risk*, let alone actual persecution. He signed the form based on comments by two individuals; one of the two was deceased, and Vidiekunas could not recall the identity of the other (*id.* at 1118-1119).

recollection of *any* of the requirements for a visa.³⁵ His statements therefore do not in any way rebut Finger's testimony about the existence of specific visa requirements.

Second, petitioner relies on a variety of documentary materials (Pet. Br. 33-36)³⁶ to support his attack on Finger's testimony. But those materials establish no more than that petitioner could have been characterized

³⁵ According to petitioner, the pertinent colloquy was as follows (Pet. Br. 43 (quoting J.A. 175)):

Former Vice Consul Frank Schilling was asked by petitioner's counsel: "Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?" and he answered: "No. That I don't remember."

When Schilling's remarks are read in context, however, they take on a totally different meaning (J.A. 175 (emphasis added)):

DJW [petitioner's attorney]—Well I have the regulations, and the regulations, of course, indicate that at the time that the priorities were given to displaced persons but were there any other criteria as to which—

FS [Schilling]—Not that I remember. *I don't remember any of the qualifications at all that were necessary. That's a long while ago.*

DJW—Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?

FS—No. That I don't remember *either*.

DJW—You have no recollection that there was any such policy?

FS—That's right.

DJW—Do you have any recollection as to what the nature would have to have been of a person's occupation in one of the occupied countries in order to make him ineligible?

FS—No. I have no recollection at all on that.

DJW—Were you ever interviewed by any of the attorneys for the Dept. of Justice in connection with this case?

FS—No I had a couple of telephone calls, that's all. *I offered no information just like I'm not offering any information now because I have no recollection of what happened at that time.*

³⁶ Most of the cited materials were submitted by the Ukrainian Bar Association in an amicus brief in support of the petition for a writ of certiorari and are not part of the record.

as a "displaced person" in the post-war period, according to several definitions of the term. The materials do *not* undermine Finger's testimony that the policy of the American consulate was to give visa priority to victims of Nazi persecution.³⁷

Third, petitioner claims (Pet. 23-24; Pet. Br. 44-45) that he was not put on notice concerning this issue and therefore did not realize the need to put on evidence regarding the requirements for obtaining a visa in 1947. The lack of notice, he claims, deprived him of due process. Petitioner's argument is patently without merit. The complaint put petitioner on notice that he had obtained his citizenship through misrepresentations concerning his date of birth, place of birth, wartime residence and wartime occupation (J.A. 13-14, 16-18). The government attorney, in his opening statement at trial, specifically identified the government's theory that petitioner misrepresented himself to be a victim of persecution (C.A. App. 210-211, 212); Finger's testimony focused at length on the requirement that a person had to be a victim of persecution to obtain a nonpreference visa (J.A. 187, 197, 205, 213-214, 217, 218, 233); the government's evidence on the issue was relied upon by the government attorney at the close of his case in response to petitioner's motion to dismiss under Fed. R. Civ. P. 41(b) (C.A. App. 1071), and petitioner responded to the argument without claiming lack of notice (*id.* at 1074).³⁸ Petitioner introduced evidence on that issue,³⁹ and the issue

³⁷ Although petitioner refers (Pet. Br. 36) to the 28,789 European displaced persons who were granted visas by November 1947, even petitioner's source reveals that only 555 of those visas had gone to persons of Lithuanian nationality. Ukrainian Amicus Br. App. 38a.

³⁸ Indeed, the court suggested to petitioner that he might wish to submit evidence on the issue as part of his affirmative case (C.A. App. 1074).

³⁹ That evidence included testimony from Stephen Zobarskas, a Lithuanian emigre who obtained a visa from Finger. Zobarskas testified that he was not a victim of persecution but that he nonetheless obtained a visa. C.A. App. 1160-1164, 1168-1169. Yet

was the subject of discussion in the government's post-trial brief (at 24, 31) and petitioner's post-trial brief (at 40-41) submitted to the district court. Moreover, both briefs to the courts of appeals addressed the issue (Gov't C.A. Br. 25-26; Pet. C.A. Br. 52-53), and the issue was discussed at oral argument (see Pet. App. 33a n.10). In short, there is no basis for petitioner's claim that the court of appeals somehow invented a new issue.

The court of appeals correctly held (Pet. App. 32a) that an investigation probably would have shown that petitioner was not a victim of persecution. Specifically, if the vice consul had learned of petitioner's true date and place of birth and had thereby discovered the discrepancy between his visa application and his previously submitted documents, the investigation would likely have taken several directions. First, as Finger testified (J.A. 199), a check would have been made with the authorities in the German cities in which petitioner had previously resided. Records from the Tuebingen district would have revealed that petitioner and his wife had lived under their own names in Nazi Germany since late 1944 (see J.A. 56, 59). Rather than being a forced laborer or being forced to live in a Nazi refugee camp, he had been granted the right to live without restrictions in the areas of Wuerttemberg and Hohenzollern (J.A. 59). Moreover, petitioner's wife had applied to the Wuerttemberg Minister of the Interior under her own name to practice dentistry (J.A. 57). These facts would have placed in doubt petitioner's claim that he had been a victim of Nazi persecution, since a victim of persecution would neither have applied for nor received the special considerations extended to petitioner and his wife

Zobarskas's alien foreign registration form, which was submitted as part of his visa application, reflected that he represented himself to be a "forced laborer" (GX V1; C.A. Exh. 1275). See J.A. 227 (testimony of Finger that a forced laborer qualified as a victim of persecution). Moreover, Zobarskas acknowledged that Finger had asked him whether he was a victim of persecution (C.A. App. 1168). Thus, Zobarskas's case turned out to corroborate Finger's testimony.

by the Nazis (see Pet. App. 32a). Finally, the vice consul would immediately have realized that the sole piece of evidence submitted to the immigration authorities that supported petitioner's claim to be a victim of persecution was fraudulent in that it contained a false date and place of birth.

A second likely course of investigation would have been at Tuebingen University. A review of records there would have disclosed that petitioner had submitted to the University, but not to the consulate, a Lithuanian document from the Telsiai Seminary that stated his correct date and place of birth (J.A. 61-63). This fact would have shown that he was withholding from immigration officials identity documents from the country to which he owed allegiance. The Tuebingen records would additionally have revealed that petitioner told the German authorities that he had been a manager of an industrial concern during the Nazi occupation of Lithuania (J.A. 65; C.A. Exh. 547), while concealing that employment on his alien registration form (J.A. 34-35). At trial, petitioner explained that this discrepancy was the result of a mere "exaggeration" (Lodging Tr. 863-864).⁴⁰ This explanation, however, came over 35 years too late. It is not the courts today, but the vice consul in 1947, who should have been given the opportunity to decide whether petitioner's concealment of his true employment position under Nazi rule was inconsistent with a claim of having been persecuted by the Gestapo.⁴¹

⁴⁰ We note the irony that petitioner can now explain this damaging document (J.A. 65) only by stating that he committed yet another lie.

⁴¹ Finger indicated (J.A. 211) that even managing 15 employees "would have raised some questions in [his] mind, and [he] might have made further oral inquiry about [petitioner's] activities," although he would not have denied the visa on that basis alone (*ibid.*). That inquiry may have led to the discovery of evidence that petitioner's job was in fact more important than he represented at trial and was instead more consistent with what he told the Germans. Because of petitioner's concealment, the government was denied the chance to conduct such an investigation.

A third avenue of inquiry would have been among refugees in the displaced persons camps in Europe (see J.A. 212). Even 40 years after the events, the government was able to locate witnesses to the killings in Kedainiai who had information implicating petitioner (see Pet. App. 4a-5a n.1). It is likely that in 1947 or even in 1954, other witnesses could have been located in Europe who could have provided information on that subject. Such information could well have revealed that petitioner was in fact a perpetrator, not a victim, of persecution.⁴²

In sum, the court of appeals was correct in concluding that the investigation in 1947 probably would have resulted in the discovery of information revealing that petitioner was not a victim of Nazi persecution.

c. The Investigation Probably Would Have Led to the Denial of the Petition for Naturalization on the Ground that Petitioner Was Not a Person of Good Moral Character

As we discuss more fully on pages 45-48, *infra*, a fundamental requirement of naturalization is that a

⁴² Notwithstanding all of the evidence indicating that he was not a victim of persecution, petitioner suggests (Pet. 18-19; Pet. Br. 38-39) that an investigation by consular officials would have shown that he was in fact such a victim. He cites in particular his evidence that he was active in the Lithuanian resistance movement. But the district court (Pet. App. 115a) found that the evidence on the issue was "conflicting" and noted that it was "impossible to state with any degree of certainty whether [petitioner] did or did not participate in the resistance movement." Moreover, petitioner fails to explain why, if he was indeed a member of the anti-Nazi resistance movement, he moved to Germany when the German troops retreated from Lithuania. And even if petitioner did participate in the resistance movement, which we dispute, it is unclear how such participation makes him *per se* a victim of Nazi persecution. In any event, as one court noted in a similar context, whether petitioner would have successfully passed an investigation was "for government authorities to determine to their satisfaction based on complete and truthful information in [1947], not for [petitioner] to decide for himself then, or for [the court] to decide now." *Polciouskas*, 734 F.2d at 628.

person be "of good moral character" (8 U.S.C. 1427 (a)). Moreover, under 8 U.S.C. 1101(f) (6), a person is not of good moral character if he "has given false testimony for the purpose of obtaining any benefits under this chapter." Former Immigration Judge Goldberg specifically testified that if the evidence revealed that an applicant's testimony was false, a determination would have to be made "whether the false testimony was such that [he] was bound to find that [the applicant] was not of good moral character and recommend adversely on his petition for naturalization" (J.A. 170; see also J.A. 171). Petitioner repeatedly lied about his date and place of birth, his wartime occupation, and his residence during 1941. Based on petitioner's myriad false statements under oath and his submission of fraudulent documents, Goldberg in all probability would have concluded that petitioner lacked the requisite moral character.⁴³

⁴³ At a minimum, if Goldberg had discovered that the applicant had given false information about his date and place of birth to the vice consul, he would have denied the petition and referred the case to the INS for possible deportation proceedings (J.A. 170, 172-173).

Petitioner errs in suggesting (Pet. Br. 27-28) that a naturalization examiner in 1953 would necessarily have forgiven an applicant's willful misrepresentations as to date and place of birth. Goldberg's reference to Section 241(f) of the 1952 Act (8 U.S.C. 1251(f)) made clear that a naturalization examiner would have referred cases of misrepresentations in a visa application to immigration officials to consider the propriety of a deportation action; Section 241 of the Act applies only to deportation and not to naturalization or denaturalization. Goldberg's testimony was that, even if immigration officials determined that petitioner had misrepresented his date and place of birth on his visa application, Section 241(f) could operate to allow the alien to remain a resident of the United States. However, that proceeding would necessarily entail at least a temporary denial of the naturalization petition. Goldberg also made clear that another naturalization petition could be considered only if an alien obtained discretionary relief under Section 241(f) and otherwise met the requirements for citizenship, including the necessary period of residence and physical presence. J.A. 171-174.

d. *The Investigation Might Have Led to the Discovery of Facts Showing Petitioner's Role in the Atrocities at Kedainiai.*

If a vice consul had discovered petitioner's concealment of his residence in Kedainiai between July and October 1941, that fact would undoubtedly have raised suspicion,⁴⁴ since place of residence during the war was of particular significance to consular officials in Stuttgart at the time petitioner applied for his visa (see J.A. 189). Investigators in 1947 certainly knew that Nazi Germany had invaded the Soviet Union on June 22, 1941, and that in the next several months tens of thousands of Jews were slaughtered in mass executions throughout the occupied territories. Lithuania had one of the greatest concentrations of Jews who were murdered in that fashion. It was also known that many of these executions were carried out with the assistance of indigenous collaborators.

Given this background, no diligent investigator could have overlooked a willful misrepresentation concerning the critical time period between July and October of 1941 in Lithuania. Suspicion would have been raised as to why such a misrepresentation was made in the visa application;⁴⁵ that suspicion would only have been heightened if perpetrated by a Lithuanian immigrant who had been a member of the Riflemen's Association, who lived without restrictions in Nazi Germany, and who had represented that he had held a managerial position during the Nazi occupation of Lithuania. Considering that the government was able to come forward over 40 years

⁴⁴ Participation in the atrocities, of course, would have disqualified petitioner from obtaining a visa (see Pet. App. 122a-123a).

⁴⁵ Even today, while petitioner admits that he lied in representing to United States officials that he had not lived in Kedainiai at all between 1939 and 1941, he still maintains that he was not living there at the time of the atrocities. The fact that petitioner continues to insist that he left Kedainiai prior to the atrocities, in the face of overwhelming evidence to the contrary, suggests that he has something of grave importance to hide concerning his activities in Kedainiai during July and August 1941.

later with evidence that petitioner participated in the atrocities in Kedainiai in July and August of 1941—evidence that even the district court found was “strong support” for the government’s charges (Pet. App. 75a)—it is likely that in 1947, when Europe’s displaced persons camps were filled with thousands of survivors from Lithuania, credible evidence of petitioner’s participation in those atrocities could have been gathered. Indeed, even in 1954, at the naturalization stage, it is quite possible that additional evidence implicating petitioner could have been uncovered. At a minimum, it is clear that an investigation *might* have shown that petitioner was involved in the atrocities at Kedainiai in July and August of 1941.

II. IN LIGHT OF HIS PATTERN OF REPEATED MISREPRESENTATIONS, PETITIONER’S CITIZENSHIP WAS ILLEGALLY PROCURED, SINCE HE WAS NOT A PERSON OF GOOD MORAL CHARACTER

Under 8 U.S.C. 1451(a), a person whose naturalization was illegally procured is subject to denaturalization. A necessary prerequisite for naturalization is that a person be of “good moral character” (8 U.S.C. 1427(a)). See also 8 U.S.C. 1427(e) (in assessing good moral character, a court is not limited to an applicant’s conduct during the preceding five years but “may take into consideration * * * [his] conduct and acts at any time prior to that period”). And 8 U.S.C. 1101(f) (6) provides that no person shall be deemed a person of good moral character if he “has given false testimony for the purpose of obtaining any benefits under this chapter.” Read literally, these provisions suggest that even a single piece of false testimony can disqualify a person from citizenship because of a lack of good moral character. But this Court need not reach the issue of whether one isolated false statement is sufficient to show lack of good moral character, since it is clear that petitioner’s *pattern* of lies over several years—lies that could have subjected

him to *criminal* prosecution under 18 U.S.C. 1001, 1015 (a), and 1621—demonstrates his lack of good moral character. See generally *In re Yao Quinn Lee*, 480 F.2d 673 (2d Cir. 1973) (upholding denial of naturalization on ground that false statement by applicant that he was living with his wife demonstrated lack of good moral character); *Tieri v. INS*, 457 F.2d 391 (2d Cir. 1972) (upholding denial of naturalization based on pattern of false testimony); *Ralich v. United States*, 185 F.2d 784 (8th Cir. 1950) (holding that commission of perjury demonstrates lack of good moral character justifying denial of petition for naturalization); *United States v. Forrest*, 69 F. Supp. 389 (D.R.I. 1946) (ordering denaturalization based on false statements made by naturalized citizen); *Petition of Ledo*, 67 F. Supp. 917 (D.R.I. 1946) (petition for naturalization denied because applicant's false statements revealed his lack of good moral character). As one court noted in a similar context, petitioner's false statements "revealed his character as that of one willing to defraud others, even including the *parens patriae*, for his own ends." *United States v. Accardo*, 113 F. Supp. 783, 786 (D.N.J.), *aff'd* on opinion below, 208 F.2d 632 (3d Cir. 1953), *cert. denied*, 347 U.S. 952 (1954).⁴⁶

Petitioner lied repeatedly about the very facts that Congress specified must be disclosed (1924 Act, Section 7), including his date and place of birth. And those lies were clearly for the purpose of obtaining benefits under the immigration laws. To this day, petitioner has been unable to provide a cogent explanation of why he lied to the American officials.⁴⁷ The only conceivable explana-

⁴⁶ The *Accardo* court also posed the following question (113 F. Supp. at 786): "How can a person claim to be of 'good moral character' * * * at the very time he is seeking to defraud the United States, in a matter of moment both to him and to the country?"

⁴⁷ At various times, petitioner has given two different reasons for his misstatements. First, in his March 1981 sworn interview,

tion for his lies about his wartime residence, date of birth, place of birth, and wartime occupations, was that he was trying to conceal something about his past that he thought would jeopardize his visa application or his citizenship petition.

In requiring good moral character as a prerequisite to citizenship, Congress surely could not have intended to include, as an eligible candidate, someone who engaged in this type of extensive and deliberate pattern of falsehood and deception.⁴⁶ Petitioner repeatedly gave false in-

he indicated that he had false documents because he was a member of the Lithuanian underground and was trying to evade the Germans in April 1944 after the arrest of Lithuanian underground members (J.A. 131-136). But petitioner's false identification is dated April 26, 1944 (J.A. 28), and the government offered evidence at trial that the arrests of the underground members occurred on April 29, 1944 (GX T4; C.A. App. 1120-1121; C.A. Exh. 1250). Moreover, the government offered evidence that the identification card was actually forged by petitioner in *Germany* (see Pet. App. 113a). Second, during discovery petitioner claimed that he had false documents because he was trying to avoid German conscription. But petitioner's own witness, Yuožas Koncius, testified that in early spring of 1944, German conscription efforts were directed toward men born in or before 1924 (C.A. App. 1409). Obviously, petitioner would not have been protected against conscription by changing his date of birth from 1915 to 1913. In any event, these explanations do not explain why, years later, petitioner lied to the American officials even though he had given truthful information to the Germans. Nor does it explain his repeated lies that he did not live in Kedainiai during July and August 1941.

⁴⁶ Petitioner argues (Pet. Br. 24-25) that because "illegal procurement" was not a ground for denaturalization at the time he obtained his citizenship, it would be unfair to apply that provision to him. Although "illegal procurement" existed as ground for denaturalization prior to 1952, and was restored in 1961, it was omitted when the 1952 Act was passed. See Pub. L. No. 87-301, § 18, 75 Stat. 656 (amending 8 U.S.C. 1451(a)); *United States v. Kairys*, 782 F.2d 1374, 1382 n.12 (7th Cir. 1986), cert. denied, No. 85-1752 (May 27, 1986). But retroactive application of that statute is perfectly proper. First, as the court held in *Kairys*,

formation to United States government officials and did so "for the purpose of obtaining * * * benefits" under the immigration laws (8 U.S.C. 1101(f)(6)). His denaturalization is therefore required because he lacked the requisite good moral character at the time he obtained his citizenship.

782 F.2d at 1380-1382, Congress intended that the 1961 statute be applied retroactively. As the court noted (*id.* at 1382), the 1961 amendment was added to a section that already contained a retroactivity provision (8 U.S.C. 1451(i)). In addition, other provisions of the 1961 amendment were explicitly made prospective only (§§ 17, 19, 75 Stat. 656). We know of no court that has held the 1961 illegal procurement provision to be prospective only. Moreover, such retroactive application does not offend the Ex Post Facto Clause. As this Court recognized in *Johannessen v. United States*, 225 U.S. 227, 242-243 (1912), in a very similar context, a denaturalization proceeding does not impose new penalties or make illegal or fraudulent that which was previously honest or lawful. See *Kairys*, 782 F.2d at 1382-1383 (retroactive application of 1961 legislation not a violation of Ex Post Facto law); *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984) (same). The one case cited by petitioner, *United States v. Riela*, 337 F.2d 986, 989 (3d Cir. 1964), is not to the contrary. *Riela* involved no issue of retroactive application of denaturalization legislation. The court in that case simply stated that the legality of naturalization must be determined under the statute in effect at the time of admission to citizenship (*ibid.*). *Riela* does not help petitioner, since good moral character was a statutory prerequisite to naturalization in 1954 (8 U.S.C. 1427(a)), when petitioner received his citizenship. In any event, petitioner was plainly on notice that misrepresentations to immigration authorities could result in his loss of citizenship. Indeed, in 1948, when petitioner declared his intention to become a United States citizen (J.A. 38-41), illegal procurement was still a basis for denaturalization. Nationality Act of 1940, ch. 876, § 340, 54 Stat. 1160. Furthermore, petitioner's application for citizenship warned him about the importance of telling the truth (J.A. 42). Petitioner could not possibly have believed when he obtained his citizenship that concealing facts and lying under oath about such basic data as his date of birth, place of birth, wartime residence and wartime occupation had somehow been sanctioned by Congress when in 1952 it deleted illegal procurement as a basis for denaturalization.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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MARCH 1987



APPENDIX


1. Section 2 of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 154 (repealed in 1952), provides in pertinent part:

(f) No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this Act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.

2. Section 7 of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 156-157 (repealed in 1952), provides in pertinent part:

(a) Every immigrant applying for an immigration visa shall make application therefore in duplicate in such form as shall be by regulations prescribed.

(b) In the application the immigrant shall state (1) the immigrant's full and true name; age, sex, and race; the date and place of birth; places of residence for the five years immediately preceding his application; whether married or single, and the names and places of residence of wife or husband and minor children, if any; calling or occupation; personal description (including height, complexion, color of hair and eyes, and marks of identification); ability to speak, read, and write; names and addresses of parents, and if neither parent living, then the name and address of his nearest relative in the country from which he comes; port of entry into the United States; final destination, if any, beyond the port of entry; whether he has a ticket through to such final



destination; whether going to join a relative or friend and, if so, what relative or friend and his name and complete address; the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently; whether ever in prison or almshouse; whether he or either of his parents has ever been in an institution or hospital for the care and treatment of the insane; (2) if he claims to be a non-quota immigrant, the facts on which he bases such claim; and (3) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws, as may be by regulations prescribed.

(c) The immigrant shall furnish, if available, to the consular officer, with his application, two copies of his "dossier" and prison record and military record, two certified copies of his birth certificate, and two copies of all other available public records concerning him kept by the Government to which he owes allegiance. One copy of the documents so furnished shall be permanently attached to each copy of the application and become a part thereof. * * *

* * * * *

(f) Each copy of the application shall be signed by the immigrant in the presence of the consular officer and verified by the oath of the immigrant administered by the consular officer. * * *

3. 8 U.S.C. 1101 provides in pertinent part:

(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

* * * * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

* * * *

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

4. 8 U.S.C. 1427 provides in pertinent part:

(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner * * * (3) during all the period referred to in this subsection has been and still is a person of good moral character * * *.

* * * *

(e) In determining whether the petitioner has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.

5. 8 U.S.C. 1451 provides in pertinent part:

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by con-

cealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *.

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No. 86-228

Supreme Court, U.S.

FILED

APR 9 1987

JOSEPH F. SPANIOLE, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

— o —
JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

— o —
**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

— o —
**PETITIONER'S REPLY MEMORANDUM TO THE
MOTIONS AND BRIEFS OF THE AMICI IN
SUPPORT OF THE GOVERNMENT**

— o —
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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Summary	1
Argument	2
I. The Record Shows Petitioner's Background Made It Unlikely He Would Commit Any Atrocity	2
II. There Is A Complete Absence Of Free World Evidence Against Petitioner	6
III. The Accusations Against Petitioner Emanate From The KGB And Soviet Disinformation Against Baltic Emigres	8
IV. The District Court Properly Ruled That The Soviet Depositions Were Inadmissable	11
V. The District Court's Finding That The Soviet Depositions Were Unreliable Was Not Manifest- ly Eroneous	19

TABLE OF AUTHORITIES

CASES	Page
<i>Atlantic Mutual Ins. Co. v. Lavino Shipping Co.</i> , 441 F.2d 473 (3rd Cir. 1971) _____	13
<i>Caldwell v. Craighead</i> , 432 F.2d 213 (6th Cir. 1970) cert. denied, 402 U.S. 953 (1971) _____	13
<i>Maikovskis v. INS</i> , 773 F.2d 435 (C.A. 2, 1985), cert. denied, 106 S. Ct. 2915 (1986) _____	13
<i>Oberlin v. Marlin Amer. Corp.</i> , 596 F.2d 1322 (7th Cir. 1979) _____	18
<i>Plummer v. Western Intern. Hotels Co., Inc.</i> , 656 F.2d 502 (9th Cir. 1981) _____	13
<i>Pollard v. Met. Life Ins. Co.</i> , 598 F.2d 1284 (3rd Cir. 1979), cert. denied, 444 U.S. 917 _____	13
<i>Multi-Medical Convalescent v. NLRB</i> , 550 F.2d 974 (4th Cir. 1977) _____	13
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943) ____	20
<i>Treate v. United States</i> , 297 F.2d 120 (5th Cir. 1961) ____	13
<i>United States v. Kowalchuk</i> , 571 F. Supp. 72, 773 F.2d 448 (C.A. 3, 1985), cert. denied, 106 S. Ct. 1188 (1986) _____	8, 13, 14
<i>United States v. Linnas</i> , 527 F.Supp. 427 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982) _____	13
<i>United States v. Lopez</i> , 543 F.2d 1156 (5th Cir. 1976) ____	13
<i>United States v. Nicholson</i> , 492 F.2d 124 (5th Cir. 1974) _____	13
<i>United States v. Osidach</i> , 513 F. Supp. 51 (E.D.Pa. 1981) _____	13

TABLE OF AUTHORITIES—Continued

	Page
STATUTES	
8 U.S.C. § 1451(a)	1
Displaced Persons Act of 1948, 50 U.S.C. App. § 1951 et seq. (1952 ed.)	3
RULES	
Federal Rules of Civil Procedure, Rule 26	10, 11, 15
Federal Rules of Evidence, Rule 105	13
Federal Rules of Evidence, Rule 611(c)	18
OTHER AUTHORITIES	
Historical Perspectives on American Immigration Policy, M. Seller, 45 Law & Contemp. Probs. 137 (Spring 1982)	2



SUMMARY

There is no admissible evidence in the record that petitioner is other than a naturalized Lithuanian emigre to the United States who led a relatively uneventful life, until retirement, as a dental technician. No cross petition was filed by the Government to raise the issue as to whether the District Court was manifestly erroneous in finding that the Soviet depositions were unreliable or engaged in a gross abuse of discretion in ruling that to admit the Soviet depositions would constitute a denial of fundamental fairness and thus deprive petitioner of due process of law. Nevertheless, the amici in support of the Government have gone outside the record of admissible evidence and injected into their Briefs contentions and arguments based on Soviet depositions ruled inadmissible and found unreliable by the District Court. (ADL BR. 3-12, 25-28; WJC BR. 2, 5-6, 16-19).¹

The issues on which this Court granted certiorari all involve the proper standard for determining "materiality" of misrepresentations as to date and town of birth under the denaturalization statute, 8 U.S.C. 1451(a). The "hydraulic pressure" created by accusations of participation in atrocities serves not only to distract from the Questions Presented, but also poses a great challenge to the fairness, impartiality and integrity of our judicial system since those organizations, otherwise dedicated to individual rights, would use the atrocities charges as a basis for diluting the rights of naturalized citizens by enhancing govern-

¹ Page citations to the Motion and Brief of the Anti-Defamation League of B'nai B'rith, etc. are preceded by "ADL BR.," page citations to the Motion and Brief of the World Jewish Congress are preceded by "WJC BR.," page citations to the Court of Appeals Appendix volumes are preceded by the letter "A"; and page citations to the Court of Appeals Trial Exhibit volumes are preceded by the letter "X".

ment power to denaturalize under a mere "possibility" test.² Petitioner, thus, feels compelled to diffuse that pressure by providing this Court with the scope of what was before the District Court when, it found in a non-jury trial, that the Soviet depositions were unreliable and inadmissible against petitioner.

Prior to its ruling, the District Court examined all of the material, including viewing the Soviet videotape, offered by the Government. As demonstrated by the record and the Opinion of the District Court, no court could have exercised its discretion on admitting evidence in any other way and still have accorded due process of law to the petitioner.

O

ARGUMENT

I. THE RECORD SHOWS PETITIONER'S BACKGROUND MADE IT UNLIKELY HE WOULD COMMIT ANY ATROCITY

After six years as a seminarian, petitioner obtained the equivalent of one year of ROTC training and then spent two months of military service with the army of the Republic of Lithuania during peacetime in the latter part of 1939. (X144-145). By the time the Germans invaded Lithuania in June of 1941, petitioner, the alleged leader of the atrocities, was a 25-year-old bookkeeper in a branch of the Bank of Lithuania and lived in a boarding house. As he disclosed in his immigration papers (J.A. 43), he was a member of the Sauliai who attended choir practices

² Such a short sighted approach ignores the historical use of immigration laws to punish the undesirable of the times, such as the post-World War I Palmer raids when thousands of Jews and Italians were deported as revolutionaries, "often on the flimsiest of evidence." M. Seller, *Historical Perspective on American Immigration Policy*, 45 Law & Contemp. Probs. 137. 151 (Spring 1982).

until it was disbanded by the Russians after they invaded Lithuania in 1940. The Sauliai has never been on any "inimical list" and membership therein has never disqualified anyone from obtaining a visa or citizenship. Petitioner was never by employment, occupation, or military service ineligible for a visa or citizenship (J.A. 222). The Government conceded at the trial that this is not a "status" case (J.A. 222), such as the one brought against Feodor Fedorenko under the Displaced Persons Act of 1948, which was not enacted until after petitioner obtained his visa.

The Government offered in evidence the deposition testimony of his sister-in-law, Juze Rudzeviciene, who testified that petitioner was a non-violent, religious man, who never possessed a weapon and had never shown any hatred or hostility toward Jews. (X1030-31, 1033, 1067, 1082-83, 1100-01).

During the latter part of 1941 to early 1942, he returned to the seminary in Telsiai, Lithuania (J.A. 51-52) and the listing of his residence on his visa application during that period is correct (J.A. 30).

During the German occupation, petitioner worked first in a print shop in Kaunas and then as a bookkeeper in a mom and-pop brush and broom shop in that city. (A1247-48). His internal Lithuanian passport, which was part of his immigration file when he obtained his visa, listed his occupation as "office worker" (J.A. 28).

There is some evidence in the record, as the District Court found, that he risked being persecuted by the Nazis for high treason by assisting the anti-Nazi Lithuanian underground in obtaining printing presses and types and in the distribution of literature advocating resistance to German mobilization of Lithuanians. (Lodging, R.916-919; A1132, A1153; and Janson Exhibit S-1, pp. 10-12.)

In its brief the ADL splices together disassociated "facts" not in the record to create a chameleonic "list" from which it argues that the petitioner kept a list of the members of "his group" in the "commandant's office." (ADL BR. 6-7).

The ADL contends that the mythical "list" (which was not a list of former Siauliai members) described in the excluded Kriunas deposition, was the same "list" referred to six months earlier by the petitioner when, in October 1981, he wrote a letter (J.A. 138-139) referring to what he mistakenly assumed to be a list of former Siauliai members obtained by the Soviets from the office of the former Lithuanian Army commandant (following the first Soviet invasion of Lithuania in 1940). In fact, the only list the Government had was its own attorneys' prepared list of Lithuanian names used by the Government during an interrogation of the petitioner prior to filing this action.³

At trial petitioner explained that his letter referred to a list of Sauliai members maintained by the *Lithuanian* commandant prior to 1940, and he testified unequivocally that he personally never had access to, nor saw, any such list. (Lodging, R.826).

Mrs. Kungys testified that when she and the petitioner left the City of Kaunas in the summer of 1944, it was virtually being emptied as people fled from the Soviet front. (Lodging, R.1061). She further testified that petitioner

³ The OSI "list" apparently consists of 44 names of persons who have nothing in common apart from the coincidence that they are Lithuanian and include such people as petitioner's brothers, a sister, and sister-in-law, none of whom were in Kedainiai at the time of the killings in 1941. Mrs. Kungys, who was born and raised in Kedainiai, was read the names on the OSI list and could recognize only ten persons, such as a priest, a butcher, a school teacher, and relatives. (Dep. Trans. pp. 132-143; Docket Entry 74).

did not want to leave Lithuania (Lodging, R.1062), and they stayed for three months near his parents' farm near the German border until bombs were literally exploding on the farm. (Lodging, R.1206). Her brother had sent her letters imploring that they get close to the Western Front and join him in Strausberg, Germany. (Lodging, R.1061).

Contrary to the false impression of petitioner's privileged flight and reception into Germany (ADL BR. 8), Koncius and Mrs. Kungys testified that petitioner had been seized under gunpoint by the Nazi S.D. and forced to dig trenches under severe conditions until he led an escape (Lodging, R.1063-1070, 1208-1210), and eventually got to the rural area around Tuebingen, where he knew a Lithuanian refugee priest. (A1259). The District Court found that Koncius' testimony had the "ring of complete truthfulness." (Pet. App. 115a).

In its brief the ADL contends that petitioner and his wife received permission from Nazi authorities to reside in Germany "without special restrictions" and that his wife petitioned for permission to practice dentistry in the Nazi Reich (ADL BR. 8). There is no evidence in the record that petitioner received any special benefits or any favored treatment from the "Nazis" and his wife did not receive permission to practice dentistry until after the Allies occupied the area. (Lodging, R.1072).

Unchallenged testimony concerning the conditions under which the Kungy's family lived as refugees in Germany was provided through the testimony of both Mrs. Kungys (A1237-1248; Lodging, R.1060-1074; A1264-1282) and Yuozas Koncius (Lodging, R.1202-1223; A1414-1422). Based upon that testimony, the District Court found that the Kungys family lived in a refugee camp and that from that camp the petitioner and his brothers went out into the countryside and "joined prisoners of war and other

displaced persons working on neighboring farms." (Pet. App. 116a-117a). It can hardly be plausibly argued that living in a refugee camp and working along with prisoners of war and other refugees on a farm in order to keep your family from starving constituted "favored treatment" or the receipt of the "benefits" of living and working under rural German civil authorities. The amici rhetoric is based solely upon the fact that no *special restrictions* were placed on the petitioner or his family (such as would have been placed on a fugitive, or prisoner of war). (Lodging, R.843). The Government offered no evidence even to suggest that the petitioner and his family were treated any differently than the tens of thousands of other refugees who fled the advance of the at least equally despicable Red Army and ended up in refugee camps in Germany in the final turbulent days of the War.

No UNRRA screening committee, on which there were Soviet representatives, ever accused petitioner of being a Nazi collaborator. (See J.A. 69). After the Allied occupation, German civil authorities attested to the good conduct of petitioner (J.A. 37) and not even the Soviets had made any accusation against petitioner at the time of his application for visa in 1947 or citizenship in 1954. (X19-20).

II. THERE IS A COMPLETE ABSENCE OF FREE WORLD EVIDENCE AGAINST PETITIONER

In advancing their mere "possibility" test, the amici contend that it is possible that if the consular officers had investigated in January 1947 they "might have" found evidence petitioner participated in atrocities. (ADL BR. 28, WJC 16-19).⁴ Only rhetoric could support such sheer

⁴ The American consular officers did not and could not have had access to Soviet sources of investigation (NKVD). As former vice consul Finger testified the sources of investigation were the consular files, the German police and the refugee camps. (J.A. 198-199).

speculation. The government admitted during discovery that there was no information about petitioner in the records of the Federal Bureau of Investigation, the Central Intelligence Agency, the State Department Office of Security, the Berlin Document Center, Federal Republic of Germany, the Weisenthal files, the International Refugee Organization, and the Subcommittee of Immigration, Citizenship and International Law of the Judiciary Committee. [Answers to Interrogatories No. 39, 41-45, and 48 (X1314-1315)]. In response to petitioner's requests to admit, the Government conceded there were no records that petitioner was ever a member of the Nazi party, the German military, any police organization, or that he ever was convicted of a crime anywhere. (X19-20, X1309-10, Admission and amended Admissions, 3, 4, 18, 19, 21, 26, 45, and concessions at oral argument on January 24, 1983 before Magistrate Peretti, Docket Entry No. 115).

At the trial, the Government did not produce a single witness in the Free World who had first-person actual knowledge that petitioner committed any atrocity. The Government introduced voluminous German records which depicted the Nazi persecutions and murders through Lithuania (G Series, X212-474). The Government admitted that none of the German records contains petitioner's name or indicates that the petitioner had in any way participated in any of the persecutions or killings. (Admission No. 26, A573). In fact, the German records do not even reflect that any Lithuanian residing in Kedainiai participated.⁵

⁵ In its opinion, the District Court found:

"[the German records] constitute evidence that [the Nazis] used local people in the course of their work, they do not refer to the use of local people at the killings in Kedainiai nor do they implicate the defendant in this case in any way." (Pet. App. 52a).

The petitioner testified and denied that he participated in any of the persecutions or killings. (A1068-69).

III. THE ACCUSATIONS AGAINST PETITIONER EMANATE FROM THE KGB AND SOVIET DISINFORMATION AGAINST BALTIC EMI-GRES

The District Court found that the Soviet obsession with eradicating all traces of nationalism in Lithuania raised substantial doubts about its role as the source of accusations against petitioner. (Pet. App. 89a).⁶ In view of the acknowledged reliance by the Government since 1979 upon Soviet authorities for both "investigation" and the "production of witnesses", at the trial petitioner put in evidence the un rebutted Free World testimony of a former KGB agent, Imants Lezinskis (X1316-1400), a former CIA agent, Melbourne Hartman (X1401-55; X1712-1826), a Baltic scholar, Tonu Parning (X1456-1511), a former investigator for the Lithuanian procurator, Zigmas Butkus (X1512-98), and a former Soviet procurator, Friedrich Neznansky (X1668-1711). Their testimony described

(Continued from previous page) -

That finding was corroborated by the testimony of the OSI historian Hilberg. (A573). He conceded the German word for "local" (ortlich) is not contained in any document referring to Kedainiai. (A533). He admitted he had no knowledge of petitioner (A432-433).

⁶ The Soviets were so incensed that a Lithuanian priest in the United States sent care packages to Lithuania, he was sentenced *in absentia* (X113). The Kungys family continuously sent care packages to relatives in Lithuania. (J.A. 78). As found by the District Court in *U.S. v. Kowalchuk*, 571 F.Supp. 72 (E.D.Pa. 1983),

"That practice was frowned upon by the Soviet authorities, not only because it was viewed as an unwelcome reminder of the disparities between the living conditions in the United States and in the Soviet-controlled Ukraine, but also because most Ukrainian emigres were supporters of Ukrainian independence . . . But as a result of the correspondence, Soviet officials learned of defendant's existence and whereabouts." 571 F.Supp. at 77-78.

(a) Soviet continuing efforts to counter nationalistic feelings in the Baltics by discrediting emigres to the Free World from the Baltic states by accusing them as being war criminals; and (b) the Soviet prosecutorial system being but a satellite of the state security apparatus with no inhibitions against using forged or fabricated evidence and perjured testimony in "political" cases.

Cumulatively, they described a morally corrupt judicial system totally subjugated to the communist political system, where the use of fabricated evidence and perjured testimony is the norm. It is no salve to the constitutional rights of the naturalized citizen that the cold hand of the KGB is in the warm glove of the OSI, when the Soviets reach across the seas in pursuance of Soviet goals.

Lezinskis (who testified under protective CIA custody), in particular, described the KGB *modus operandi* in discrediting Baltic emigres which parallels the Soviet involvement in this case. The Soviet Union has no genuine interest in seeking redress for the victimization of Soviet Jews, but, starting with the Khrushchev era, it engaged in periodic "campaigns" against alleged war criminals.⁷ KGB agents would obtain "protocols" of people from different social strata, including former "gulag" prisoners, especially those who were vulnerable to being incarcerated or reincarcerated. (X1349). It mattered not that the evidence was non-existent or that the stories were inconsistent, as long as the accusations came from a cross section

⁷ Lezinskis testified that the intensity of the Soviet accusations was the result of the Carter Administration's criticism of the Soviet violations of the civil rights of Soviet Jewry and the Helsinki document. (X1355). The role of the KGB in "war crimes" cases is corroborated in the testimony of former Soviet procurator Neznansky (X1618, 1643, 1687-95).

of the community. The KGB would then have stories planted in the Israeli and American press hoping to instigate an investigation of the Baltic emigre. (X1353-4). The purpose is not only to claim the United States is harboring "war criminals" but to quell all vestiges of Baltic nationalism. (X1337-8). In this case the KGB obtained protocols and then produced for deposition Kriunas, who had spent 10 years in a gulag; Narusevicius, who had received a 25-year sentence; Dailide, a trade school teacher; Silvestravicius, a truck driver; and Devidonis, a bus driver.⁸

Although the Government refused to answer petitioner's interrogatories as to when the investigation began (Interrog. 38), or to identify and produce any correspondence, diplomatic notes, or cable traffic with the Soviet Union (Interrog. 39), the amici, as well as the Government in its Brief to this Court (U.S. BR. 44-45), have now argued that this Court should establish a "possibility" test of materiality which permits speculation as to what an investigation in the Soviet Union would have disclosed at the time of petitioner's application for a visa in 1947 and for citizenship in 1954. In fact, the earliest disclosed Soviet accusation against the petitioner (as well as 12 other Lithuanian emigres to the United States) was a KGB-planted article in the November 24, 1965 edition

⁸ Butkus testified that the Soviet depositions are not even conducted in accordance with Soviet law, let alone the Federal Rules of Civil Procedure as required by the District Court's order of October 14, 1981 or the 1935 Treaty between the United States and the Soviet Union. Neznansky testified that in "political" cases, no criminal procedure is applicable, such cases are handled by the KGB, who obtain incriminating evidence at whatever cost and give secret instructions to procurators on how to handle such cases (X1666), including tampering with evidence and transcripts (X1694). Because the accused person is an "enemy" of the people, witnesses are told it is their "civic duty" to testify in the appropriate way. (X1694).

of *Morning Freiheit*, recognized by the FBI and Congress as a Communist propaganda rag for over a quarter century (see House Report 1311), (see also Lezinskis, X1335, 1339-40, 1353-54). It is that article which first led to the INS interview of petitioner in 1975 (J.A.70-79), long after he had received his visa in 1948 and been naturalized in 1954.

IV. THE DISTRICT COURT PROPERLY RULED THAT THE SOVIET DEPOSITIONS WERE INADMISSABLE

The District Court watched the videotaped depositions of six Soviet witnesses; reviewed "protocols" purporting to represent prior statements of the deponents taken by the Soviet government; and considered the objections to the Soviet depositions advanced on behalf of the petitioner. In its opinion, the District Court ruled:

"I have concluded that these depositions, insofar as they purport to inculcate defendant, are *unreliable* and were taken under such circumstances that their use against defendant would violate fundamental consideration of fairness. No single factor compels this conclusion, but the circumstances in their totality permit no other conclusion." (Pet. App. 86a) (emphasis added).⁹

The District Court then undertook a detailed analysis of the reasons for that ultimate finding, and found, *inter*

⁹ The Soviet depositions were taken *de bene esse* pursuant to an order dated October 14, 1981 (A50-52). That order provided that the depositions would "be governed by the Federal Rules of Civil Procedure and plaintiff shall not interfere directly or indirectly with the right of defense counsel to conduct a full and free cross-examination of each witness" (A52), and that "no witness shall be instructed by plaintiff not to answer any questions." (A52). That order also provided that the Government "shall have present at each day of each deposition in Europe translators proficient in Lithuanian and Russian who are disinterested in the outcome of the lawsuit. . . ." (A52; Pet. App. 95a). At the depositions the Government disregarded such fundamental procedural safeguards.

alia, (a) "many aspects of the deposition procedures cast doubt upon the reliability of the testimony concerning defendant" (Pet. App. 95a) including: (1) warm up questioning by the Soviet Procurator to lock in the witnesses' testimony (Pet. App. 97a-98a); (2) limitations imposed by Soviet Procurators on the scope of petitioner's cross-examination of the Soviet witnesses (Pet. App. 98a-101a); (3) interference with petitioner's cross-examination of the Soviet witnesses by the Soviet procurator (Pet. App. 99a-100a); (4) strategic omissions and mistranslations of the testimony of the Soviet witnesses by the Soviet interpreters (Pet. App. 101a); (5) the pervasive use of blatantly leading questions by the Government, "improperly affecting" the entire proceeding (Pet. App. 98a); and (6) interference by the Government in the cross-examination of the Soviet witnesses (Pet. App. 100a); and (b) "that these depositions, insofar as they purport to inculcate defendant, are unreliable" (Pet. App. 86a), noting (a) material inconsistencies between the deposition testimony and the deponents' "protocols" (Pet. App. 104a-105a); (b) the failure of any witness to identify unequivocally the war-time photograph of petitioner (Pet. App. 80a, 83a, 86a); (c) the absence of earlier "protocols" and transcripts of earlier testimony by the deponents about the Kedainiai killings (Pet. App. 105a-108a); (d) the potential for undue influence by Soviet authorities over the deponents (Pet. App. 97a-105a); and (e) material inconsistencies in the testimony of the Soviet witnesses.

Following that lengthy analysis of its holding, the Court finally concluded,

"The Lithuanian depositions will be admitted for the limited purpose of establishing the happening of the killings in Kedainiai in July and August 1941. They will not be admitted as evidence that defendant participated in the killings." (Pet. App. 108a).

A trial court's discretionary determinations as to the admissibility of evidence are significant on appeal only if "manifestly erroneous." *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284 (3rd Cir. 1979), *cert. denied*, 444 U.S. 917, *reh. denied*, 444 U.S. 985 (1980); *Atlantic Mutual Ins. Co. v. Lavino Shipping Co.*, 441 F.2d 473 (3rd Cir. 1971); *United States v. Lopez*, 543 F.2d 1156 (5th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

Moreover, with respect to a non-jury trial, error can *only* be predicated upon a *gross abuse of discretion* with respect to the admissibility of evidence provided the Court considers that which is offered. The trial court, sitting as both judge and trier of the facts, is presumed to disregard the inadmissible and rely upon competent evidence. *Plummer v. Western Intern. Hotels, Co., Inc.*, 656 F.2d 502 (9th Cir. 1981); *Multi-Medical Convalescent and Nursing Center of Towson v. N.L.R.B.*, 550 F.2d 974 (4th Cir. 1977); *United States v. Nicholson*, 492 F.2d 124 (5th Cir. 1974); *Caldwell v. Craighead*, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); *Teate v. United States*, 297 F.2d 120 (5th Cir. 1961).

The District Court's determination to give only limited use to the Soviet depositions is well within its *discretion* and consistent with the decisions of several other American courts in denaturalization cases brought by the Government with the assistance of the KGB. Rule 105, Fed. R. Evid.; and See, e.g., *United States v. Linnas*, 527 F.Supp. 427 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982); *United States v. Osidach*, 513 F.Supp. 51 (E.D. Pa. 1981), *appeal dismissed*, No. 81-1956 (3rd Cir. July 22, 1981); *United States v. Kowalchuk*, 571 F.Supp. 72, 79-80 (E.D.Pa. 1983); 773 F.2d 488 (1985), *cert. den.*, 1065 S. Ct. 1188 (1986). *Maikovskis v. I.N.S.*, [Immigration Court

June 30, 1983, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2915 (1986)].

In *United States v. Kowalchuk*, *supra*, the District Court stated,

"The testimony of the Soviet witnesses must be viewed with even greater skepticism. . . . Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as 'clear and convincing' proof of charges as serious as those leveled against this defendant." (571 F.Supp. at 79-80).

In its brief to the Court of Appeals in the *Kowalchuk* appeal, the Government stated,

"The District Court specifically stated that it did not rely on any of the Soviet witness testimony concerning the acts of defendant himself. As most, the Court relied on the Soviet testimony for corroboration of other evidence of the general conditions in Lubomyl and the activities of the Ukrainian militia. Although the government believes that the depositions should have been credited in their entirety, *the District Court was not in error in crediting them only to a limited extent.* (Government Brief, p.37) (Emphasis added).

The District Court noted that each deposition commenced with a warning by the Soviet procurator to the witness of his obligations under Soviet criminal law, and then the Soviet procurator "questioned each witness in broad general terms, such as 'What do you know about the execution of the Soviet activists and the Jews in Kedainiai?' (Narusevicius Dep. at 9)," (Pet. App. 97a). The District Court pointed out that the procurator's questions "called for personal knowledge and knowledge based on all manner of reports and statements of others, with no means of distinguishing one form of knowledge from the other." (Pet. App. 97a). The Soviet "warm up" interrogation of the witnesses attempted to lock in their testi-

mony and was neither neutral nor harmless. Rather, in its opinion the District Court noted the negative effect of the conditioning of the witnesses achieved by the procurator's questioning which the Court found was "compounded" by the improper form of questioning by the Government attorneys immediately following. (Pet. App. 98a).

Prior to the Government taking the Soviet depositions, the District Court (speaking through a judge who preceded the trial judge) warned that,

"This testimony is going to have to be taken according to the rules of evidence that are prevalent in this court. I can't run this thing like an inquisitorial system, this is an adversary versus adversary system. (A57) . . . I don't know how I can try a case under American law under those circumstances. (A58) . . . If the depositions aren't taken in accordance with the rules of procedure that govern this Court, then they will not be admitted, period" (A58).

After viewing the Soviet depositions, the District Court found that "the actions of the pocurator seriously limited the effect of these requirements" (Pet. App. 99a), and expressed its particular concern about the limitations placed on the cross-examination of the Soviet deponents,¹⁰ finding, *inter alia*, that (a) "cross-examination on th[e] subject [of the relationship of all the witnesses with the Soviet authorities] was limited, if not foreclosed" (Pet. App. 100a); (b) "cross-examination directed to prior statements of witnesses and their dealings with Soviet authorities was limited by the rulings of the procurator" (Pet. App. 102a); and (c) "cross-examination of one of the gov-

¹⁰ The District Court noted that, "A critical question was not only what Devidonis said about defendant in 1977 and 1967. A critical question was *whether at those times he attributed to persons other than defendant responsibility for acts of which defendant is now charged.*" (Pet. App. 99a), (emphasis added)

ernment's two most important witnesses, Juiozas Kriunas who had been in the gulag for ten years, was limited by the procurator." (Pet. App. 99a).

The District Court entered an order on October 14, 1981 which provided that the translators for the Soviet Depositions must be "disinterested in the outcome of the lawsuit" and that the identity of the translators and their credentials be disclosed 30 days in advance of the depositions. (A52). In its opinion, the District Court held that the Soviet interpreters used by the Government "was a violation of at least the spirit" of the October 14, 1981 order requiring that the interpreters be "disinterested." (Pet. App. 101a). The 30-day advance notice requirement was ignored by the Government which used whatever Intourist "guides" the Soviet procurator chose to use on any given day.

The unrefuted testimony of defense witness Daiva Kezys was that her viewing of the videotapes disclosed that the Soviet translations were replete with mistranslations and omissions (A15 and A1283-1339). The omitted translations followed a pattern of not disclosing KGB involvement in preparing the witnesses' testimony or facts tending to put the Lithuanian nationalists in a neutral light. Thus, the Soviet translators omitted the testimony of Stasys Narusevicius that his deposition was procured "When I received orders and the statement from the security authorities [Saugumas is the Lithuanian State Security or KGB]" (A1321; X878);¹¹ mistranslated with respect to the photospread "Everything has been enlarged" (A1328) which would have indicated to defense counsel

¹¹ Imants Lezinskis, a former KGB agent, testified that the KGB has no qualms or moral reservations about training witnesses for giving testimony in the Soviet Union for use in the United States (X1397).

that the witness had been shown an improperly suggestive photospread with smaller-sized pictures prior to the deposition by the KGB (X869); omitted to translate "I don't know any of them. You can chop my head off" when shown the photospread (Pet. App. 101a, X869); omitted to translate "During the interrogation I had learned everything what to say like prayers. I do not know anything else" (A1319; Videotape 18:45:50), which, if translated, would have opened up a whole line of inquiry of how the KGB during many hours of interrogations reduced to a few pages of protocols had taught the witnesses to testify by rote; and deliberately switched the witness testimony as to whether Lithuanians participated in shooting the Jews by saying the witness said "There were Lithuanians as well," when in fact he said "There were Germans, but who knows who they were. Maybe there were Lithuanians. Who the devil knows?" (A1316, X829).

The District Court found that although the translators "appeared qualified",

"[I]t is clear . . . that translations were skewed to throw a favorable light upon Soviet procedures and to cast the most favorable light possible upon the witnesses' testimony implicating defendant. There were strategic omissions of testimony, obviously for the same reason. . . . The omitted phraseology is significant both in itself and for the cross-examination it might have elicited. It is unnecessary to recount the numerous shadings of meaning resulting from the apparent bias of the interpreters. . . . It is always possible to re-translate the entire deposition testimony if necessary, but that would not assist defense counsel who had to cross-examine on the basis of the translations made on the scene." (Pet. App. 101a)

During the course of oral argument prior to the entry of the order of October 14, 1981, the District Court warned the Government attorneys to be careful not to ask leading or other improper questions as the Soviet depositions were

being taken *de bene esse*, and the Government attorney responded, "Oh, certainly, your Honor." (A32). The order of October 14, 1981 expressly reserved all objections until trial. (A52, ¶ 12).

Notwithstanding that warning and the court order, at the Soviet depositions the Government attorneys followed the same format as the Soviet procurator in using a staggering amount of leading questions and eliciting blatantly inadmissible hearsay, which the chief trial counsel of the Government tried to rationalize at trial on the basis that the Soviet procurator had already locked in the witness by such techniques. He represented to the Court that the reason for his plethora of leading questions should be countenanced by the Court was that proper questions would "confuse" and "agitate" the Soviet witnesses. (A1491-2).¹² Thus, the Government examination of Kriunas contained 91 leading questions and 54 questions with either non-responsive or obvious hearsay answers, and the Government examination of Dailide contained 133 leading questions and 32 questions with either non-responsive or obviously hearsay answers. The extent of leading questions resulted in the testimony being tantamount to the prosecutors' testimony and not the witnesses' testimony.¹³

Accordingly, the District Court made the following findings:

"The government's method of questioning the witnesses compounded the difficulties created by the pro-

¹² Non-leading questioning by the OSI could have resulted in the Soviet deponents forgetting their stories which Devidonis stated were learned "like prayers." (A1319).

¹³ Under Rule 611(c), Fed.R.Evid., leading questions are prohibited except under limited circumstances. In *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1329 (7th Cir. 1979), the Seventh Circuit pointed out that "the questions excluded consisted of [the witness'] adoption of what was in effect [the] attorney's testimony. . ." (596 F.2d at 1329).

curator's sweeping generalized questions: *The government attorneys persisted time and again to pose blatantly leading questions, drawing upon the protocols which the witnesses had signed and upon the answers which the witnesses had given to the procurator's questions.* Before I concluded that the deposition testimony cannot be admitted for the purpose of implicating defendant in the Kedainiai killings, I attempted to separate the most clearly objectionable questions from less objectionable ones, but *the entire proceeding was improperly affected by this form of questioning.*" (Pet. App. 98a) (Emphasis added).

By virtue of such evidentiary improprieties the resulting testimony was so impaired it could not possibly have met the burden of clear, convincing and unequivocal proof.

V. THE DISTRICT COURT'S FINDING THAT THE SOVIET DEPOSITIONS WERE UNRELIABLE WAS NOT MANIFESTLY ERRONEOUS

The District Court found: "I have concluded that these depositions, insofar as they purport to inculcate defendant, are unreliable . . ." (Pet. App. 86a). The District Court reviewed the protocols of each of the Soviet deponents, and found numerous material inconsistencies between the deposition testimony and their 1977 protocols.

For example, although Dailide at first categorically testified (1) that he never saw a pistol in petitioner's hand (X934:1-2); (2) that he did not know if petitioner received any property or clothing from the Jews (X953:6-8) and even more strongly that "Kungys did not have much. He came with one suitcase and left with one suitcase." (X953:12-14); (3) that he did not see a wardrobe and two suitcases filled with clothing in Kungys' home (X953:18); (4) that only Germans fired shots at the Jews (X956:8); (5) that he did not see Lithuanians fire shots (X956:11); (6) that he could not tell if Lithuanian police participated in the shooting (X958:24); (7) that he did not know if mem-

bers of a Lithuanian detachment were present at the shooting ditch (X959:4); and (8) that he did not see savage behavior toward the Jewish children (X965:11)—he then apologized and directly contradicted his own testimony on each of these matters after being impeached with a 1977 “protocol,” which he did not even recall giving (X963:12), did not recall reading (X964:24), and could not recall what he told the procurator in 1977 (X965:19). In light of such almost total contradictions, the District Court found,

“One is also left to speculate whether what is stated in the protocol is true, whether what Dailide first testified to is true or whether both the protocol and the original testimony are false insofar as it relates to defendant. . . . One can only speculate how much more of the protocol was the invention of the interrogators.” (Pet. App. 103a).

Such equivocal and contradictory evidence could hardly meet any evidentiary test, let alone the doubt-free test.

After its review of the record, the Court of Appeals bypassed the District Court’s ruling as to the unreliability and inadmissibility of the Soviet depositions. Yet, the amici in support of the Government would have this Court take into consideration the clearly inadmissible and unreliable Soviet depositions as the basis for establishing a mere “possibility” test for materiality which would not even require admissible proof of the existence of an ultimate disqualifying fact. (WJC BR. 15-19; ADL BR. 17-19). Such a standard of materiality would reduce the doubt-free test to a mockery. *Schneiderman v. United States*, 320 U.S. 118 (1943).

Respectfully submitted,

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April, 1987

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(11)
No. 86-228

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1986

—○—
JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—○—
**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

—○—
**PETITIONER'S REPLY BRIEF TO THE
BRIEF OF THE UNITED STATES**

—○—
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TABLE OF CONTENTS

	Page
Table of Authorities _____	ii
Summary _____	1
Argument _____	3
I. There Is No Doubt Free Proof of The Existence of an Ultimate Disqualifying Fact _____	3
II. The Court of Appeals Correctly Held That Petitioner's Alleged Omissions of Wartime Residences and Occupations Were Not Material Under the Second Prong of Chaunt _____	6
III. The Requirements for Proving False Swearing, Perjury or Lack of Good Moral Character Under Other Statutes Do Not Govern the Standard for Proving Materiality Under the Denaturalization Statute _____	11
IV. Petitioner's Citizenship Was Not Illegally Procured _____	15
Appendix _____	1a

TABLE OF AUTHORITIES

Page

CASES:

<i>Afroyim v. Rusk</i> , 387 U.S. 253 (1967) _____	20
<i>Berengi v. District Director</i> , 385 U.S. 630 (1967) ____	14
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960) _____	<i>passim</i>
<i>Costello v. United States</i> , 365 U.S. 265 (1961) _____	11, 18
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981) ____	<i>passim</i>
<i>In re Haniataakis</i> , 376 F.2d 728 (3rd Cir. 1967) _____	14, 16
<i>Klapprott v. United States</i> , 335 U.S. 601 (1948) ____	12, 20
<i>Maikouskis v. INS</i> , 773 F.2d 435 (C.A. 2, 1985), cert. denied, 106 S. Ct. 2915 (1986) _____	16
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943) _____	<i>passim</i>
<i>United States v. Kairys</i> , 600 F. Supp. 1254 (N.D. Ill. 1984), <i>aff'd</i> , 782 F.2d 1374 (C.A. 7, 1986), cert. denied, 106 S. Ct. 2258 (1986) _____	18
<i>United States v. Riela</i> , 337 F.2d 986 (C.A. 3, 1964) _____	14
<i>United States v. Rossi</i> , 229 F.2d 650 (C.A. 9, 1962) _____	14
<i>United States v. Security Industrial Bank</i> , 459 U.S. 70 (1982) _____	19
<i>United States v. Sheshtawy</i> , 714 F. 2d 1038 (C.A. 10, 1983) _____	16

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const., 5th A. (Due Process Clause) _____	20
U.S. Const., 14th A. (Citizenship Clause) _____	20
Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 <i>et seq.</i> _____	5

TABLE OF AUTHORITIES—Continued

	Page
Immigration Act of 1924, ch. 190, 43 Stat. 153, 7(b)	7
Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 <i>et seq.</i> :	
§ 101(f)(6), 8 U.S.C. 1101 (f)(6)	14, 16, 18
§ 340(a), 8 U.S.C. 1451(a)	1, 2, 14, 15, 16, 17
§ 340(i), 8 U.S.C. 1451(i)	19
Nationality Act of 1940, ch. 876, § 338(a) 54 Stat. 1158-59	19
Pub. L. No. 87-301, 75 Stat. 650 <i>et seq.</i> :	
§ 17,75 Stat. 656 (1961)	19
22 C.F.R. (1946):	
Section 61.301	5
Section 61.313, note 119	3
Section 61.346(c)	5
 OTHER AUTHORITIES	
Displaced Persons in Europe, Report No. 950, S. Rep. 950, 80th Cong., 2d Sess. (1948)	5
Presidential Directive, Dec. 22, 1945	3, 5
The Black Book, O. Savitch, The Fate of the Jews in the City of Telshai	7
H. R. Report 1365, 82nd Cong., 2d Sess. (1952)	19
H. R. Report 1086, 87th Cong., 1st Sess. (1961)	19
S. Rep. 1137, 82d Cong., 2d Sess. (1952)	19



SUMMARY

The Questions Presented on which this Court granted certiorari all involve the proper standard for determining the "materiality" under the denaturalization statute, 8 U.S.C. § 1451(a), of misrepresentations as to date and town of birth at both the visa application and naturalization stages of citizenship. The lynch pins of the Third Circuit's decision to reverse the District Court were its false perception that the record contained an ultimate disqualifying fact (that non-preference, quota immigration visas were issued only to victims of Nazi persecution); and its faulty "probability" test under the second prong of *Chaunt*, pursuant to which it made the *de novo* finding that if an investigation were conducted as a result of the disclosure of the immaterial date and place of birth, it "probably" would have led to the disclosure that petitioner was not a "victim of Nazi persecution." Thus, even the Third Circuit's "probability" test requires proof of the actual existence of an "ultimate disqualifying fact." Here, as the District Court found, the objective evidence clearly shows that displaced persons, such as petitioner, were eligible for non-preference, quota immigration visas without any need to show they were also victims of Nazi persecution.

Although the Government did not file a cross petition for certiorari, it now argues for the even more diluted "possibility" or "might have" tests under the second prong of *Chaunt*, even if devoid of proof of any disqualifying fact. The Government equates "might have" with "possibility" which by definition is speculative and impossible to reconcile with an evidentiary standard that requires proof that is clear, convincing and unequivocal which does not leave any issue in doubt before a citizen

can be denaturalized. *Schneiderman v. United States*, 320 U.S. 118 (1943). The confusion, which the Government's argument reflects, emanates from two different expressions by this Court in *Chaunt* of an alternative approach to proving materiality when the suppressed facts would not, if known, have justified denial of citizenship. The initial expression in the majority opinion was "Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship" (*id* at 353); whereas the second time the alternative was expressed as "... or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (*id* at 355). However expressed, the alternative approach requires doubt-free proof of the actual existence of an independent, ultimate disqualifying fact, i.e. "the discovery of other facts which would justify denial of citizenship." What needs clarification is the level of proof needed to connect the suppressed facts to the independent, ultimate disqualifying fact. Only the certainty test is consistent with the doubt-free test. The "doubt-free" test is at least the equivalent of the "beyond a reasonable doubt" criminal test; whereas a "probability" test at best reaches a "preponderance" of the evidence tort test; and, of course, a mere "possibility" test would be less than that required in any other type of judicial proceeding under our system of justice.

Moreover, the Government can not avoid the materiality requirement of a misrepresentation under the denaturalization statute or its burden of proof by the doubt-free test by reference to other statutes or by reference to the inapplicable "illegal procurement" language reinstated by the 1961 Amendment to Section 1451(a).

ARGUMENT

I. There Is No Doubt-Free Proof Of The Existence Of An Ultimate Disqualifying Fact

At trial, the District Court posed the question to the Government trial attorneys, "Mr. Lynch, have you shown me such a regulation [requiring the recipient of a non-preference quota immigration visa to be a victim of Nazi persecution]?" The Government trial attorney was compelled to say "No, Sir." (Lodging, R. 1298) (Brackets added).

Neither the Solicitor General nor the amici organizations have shown this Court any such regulation because it never existed, and thus, the District Court's question to the Government is equally apt for this Court to pose to the Government. It was the petitioner who put in evidence the actual regulation then in effect (22 C.F.R. § 61.313) and the Presidential Directive of December 22, 1945, and neither contained any such requirement. (See Pet. App. 140a-151a)

Under the national origins quota system pursuant to which petitioner received his visa under the Immigration Act of 1924, petitioner was either exempt or not excludable under any of the 31 enumerated categories of exclusion (none of which excluded non-victims of Nazi persecution) set forth on the application for visa (J.A. 31-32) (Reply App. 7a). As a native born Lithuanian he was thus eligible to receive an immigrant visa under the quota for Lithuania. To the extent any visa numbers were available for those in the non-preference category, he was entitled to a first priority since he was a displaced person covered by the Presidential Directive of December 22, 1945 (Pet. App. 141a).

There was nothing in the statute or the regulations which gave either a preference or a priority to victims of Nazi persecution, let alone set forth an exclusion or disqualification for non-victims of Nazi persecution. Neither the Government nor the amici have cited to any State Department circular¹, any I.N.S. publication or any visa refusal card which makes any such reference. (Reply App. 11a-12a) Nowhere in the visa application is there any question which inquires as to whether the immigrant was a victim of Nazi persecution, as the Government's former vice consul conceded (J.A. 218). The Government has now attempted to rationalize the Third Circuit's interpretation of the testimony of a former vice consul (who did not process petitioner's visa application) to reflect an *unwritten*, informal policy because it can neither produce nor cite to any document embodying such policy. Mr. Finger's complete testimony on the so-called requirement was that the victim of Nazi persecution visa "policy" was embodied in the published regulations which the Government attorneys showed him during his trial preparations (J.A. 218, 227-228). Since even the Government must now concede that there never was any such regulation, it is clear that the District Court was correct in its finding that Mr. Finger was in error (Pet. App. 120a). It is equally clear from the statute, the regulations, and the contemporaneously prepared historical documents (Ukrainian Amicus App.

¹ The petitioner offered in evidence the Department of State Circular, July 8, 1947, which provided Information Concerning Immigration Into The United States From Germany And Austria to the Stuttgart Consular office from which petitioner received his visa on March 4, 1948 (Pet. App. 152a-155a). The District Court excluded the circular, which makes no reference to "victims of Nazi persecution", as of "marginal relevance" (Lodging, R. 1298), since the Government had not produced any such regulation.

25a-119a), that Mr. Finger remembered something which objectively never existed. Moreover, even Mr. Finger did not claim vice consuls had the authority to issue visas on the basis of an unwritten, undocumented "policy," as now argued by the Government as part of its "probability" test. (U.S. BR. 35-42).

Vice consuls had no authority to give preference or visa priorities to victims of Nazi persecution, let alone create an exclusion disqualifying non-victims of Nazi persecution. (See Note 119,22 C.F.R. § 61.301, Reply App. 7a). The regulations then in effect provided that, "An immigration visa may be refused only on a ground provided in the law and regulations." 22 C.F.R. § 61.346(c).

In his Directive of December 22, 1945, President Truman directed that displaced persons be issued visas under "existing quota laws" and that "Visas should be distributed fairly among persons of all faiths, creeds and nationalities" (Pet. App. 148a-149a) (emphasis added) — an historical evidentiary document in direct conflict with the Government's revisionist contention that, prior to the Displaced Persons Act, quota immigrant visas were issued "almost exclusively to Jews who by definition were victims of Nazi persecution" (U.S. BR. 36).² That contention would also certainly be startling to the non-Jewish committees who produced affidavits and funds for the transportation of non-Jewish displaced persons. (See Table No. 4, Ukrainian Amicus App. 42a). As stated in the INS Monthly Review of January 1948, "Persons sponsored by agencies are generally of the same religious faiths

² The Government misquoted the legislative report, which states; "It was stated that the German quota was available almost exclusively to the Jews. A total of 7,799 displaced persons were issued visas under the German quota." *Displaced Persons in Europe*, p. 26, S. Rep. 950, 80th Cong. 2d Sess. 26 (1948).

as the social agencies sponsoring them." (*id* at 43a). As indicated on his visa application, petitioner was one of the 1,096 Catholic displaced persons whose passage was paid for by the Catholic Committee for Refugees. (J.A. 32).

Irrespective of whether he was a victim of Nazi persecution, the petitioner was eligible for a non-preference quota immigration visa. Thus, the Government has not shown the existence of any ultimate disqualifying fact. Certainly uncorroborated testimony in conflict with objective historical evidence does not constitute evidence that is so clear, unequivocal and convincing that it does not leave the issue in doubt.

II. The Court of Appeals Correctly Held That Petitioner's Alleged Omissions of Wartime Residences and Occupations Were Not Material Under The Second Prong Of Chaut

In its Argument I, the Government would have this Court give a *de novo* review of the record to determine whether the alleged omissions by petitioner of one of his wartime residences and wartime occupations were "material" for denaturalization purposes under a "might have" test. (U.S. BR. 16-29) The Government's Brief criticizes the petitioner for focusing on the misrepresentations of date and place of birth and giving only "the briefest mention" to his wartime residences and occupations (U.S. BR. 17). The Third Circuit, however, even under its "probability" test held that, "With respect to the defendant's misrepresentations or concealments concerning his wartime occupations and residences, we agree with the district court that they do not pass the *Chaut* materiality test." (Pet. App. 33a).

The Government is wrong in arguing that "Petitioner does not dispute that throughout the visa and naturaliza-

tion process he repeatedly misrepresented and concealed his . . . wartime residence, and wartime occupation" (U.S. BR. 17). Whereas the visa application sought his residences from the age of 14, it sought only his then "calling or occupation" (J.A. 30); and neither his declaration of intention nor his application nor his petition for citizenship even requested his wartime residences or occupation (J.A. 38-50). Section 7(b) of the 1924 Act required residences only for 5 years preceding the visa application, or here back to January 1942, all of which were correctly listed by Petitioner.

The Government's Statement implies that the petitioner listed his residence in Telsiai, Lithuania for the years 1941 and 1942 in his visa application because "The record contains no evidence of any atrocities having been committed in Telsiai" (U.S. BR. 6). The record, however, contains, as a Government Exhibit, the Certification of the Seminary of Telsiai that he was a student in Telsiai during 1941 (J.A. 51-52). As the District Court found, petitioner was a resident of Telsiai as of "mid October 1941, when both sides agree he again entered Telsiai Seminary." (Pet. App. 111a).²

Moreover, the District Court rejected the Government's implication of petitioner thwarting an investigation by the consular officers when it found,

"Seymour Maxwell Finger, who served as a vice consul in Stuttgart in January 1941 testified that disclosure of a residence in Kedainiai in 1941 would not have raised any questions in his mind. This is to be expected because there were few if any significant dis-

² Although the Government did not make it part of the "record" in this case, it has been historically reported that the Nazis did commit atrocities in Telsiai. O. Savich, *The Fate of the Jews in the City of Telshai*, referred to in *The Black Book* published by the Holocaust Library, New York. (1980). L.C. 81-81517.

tricts in Lithuania, or in all of Eastern Europe for that matter, in which atrocities against the Jewish population did not take place. Defendant's wife's visa application listed her birth place and residence in Kedainiai." (Pet. App. 119a).

Mr. Finger testified he did not even know where Kedainiai was, although he saw it listed on petitioner's visa application (J.A. 208). Indeed, Mr. Finger's observation of the name Kedainiai from the face of the visa application is significant since the petitioner obviously, at a minimum, told the German speaking personnel at the American Consulate, who filled out the form, that Mrs. Kungys was born in Kedainiai, a fact which is listed immediately below the places listed under the residences on his application for visa (J.A. 30). Former CIC officer Hartman's testimony established that there were a great deal of discrepancies between entries on visa forms and what the applicant actually said to the American Vice Consuls, and that generally the visa applicant was simply asked whether the data was correct, but "he had no way of knowing. The documents were in English." (X1727-1730, X1735-1741). Mr. Finger admitted that no one at the American consulate spoke Lithuanian. (J.A. 197). The record also contains the deposition of Kostas Januska which shows that he was granted a visa, notwithstanding being from Kedainiai and being a former member of the Siauliai as he so listed on his visa application without triggering off any investigation. (X1105-1165, X189-192).

Thus, the Court of Appeals was hardly clearly erroneous when it further held, "... because there is no hard evidence in the record that the consular officials in Stuttgart had knowledge of these particular atrocities at the time defendant applied for his visa, the government accordingly did not prove that knowledge of the defendant's

residence would have prompted an investigation." (Pet. App. 35a). Indeed, the record shows that neither this Government, nor the Third Reich, nor any other organization or government, including the Soviet Union (X19-20) had any evidence that petitioner participated in any atrocities either as of the time he received his visa in March 1948 or his citizenship in February 1954. (See, Reply Memorandum to Amici Briefs, pp. 6-8, 10-11).

Although the Government would have this Court establish a standard of materiality which would permit speculation as to what an investigation conducted then "might" have disclosed, the Government admitted during discovery that there was no information about petitioner in the record of the Federal Bureau of Investigation, the Central Intelligence Agency, the State Department Office of Security, the Berlin Document Center, the Federal Republic of Germany, the Weisenthal files, the International Refugee Organization, and the Subcommittee of Immigration, Citizenship and International Law of the Judiciary Committee. [Answers to Interrogatories No. 39, 41-45, and 48 (X1314-1315)].

There is no contemporaneous Soviet report or document in the record referring to petitioner as either the leader or participant in the atrocities. Indeed, two of the Soviet witnesses testified that they had read Communist newspaper articles about the atrocities in Kedainiai after the War and they made no reference to petitioner, but instead stated that one Kubiliunas was shot for being the leader of those atrocities. (Dailide, X1014-15 and Devionia, X721, see also X234).

The Government introduced voluminous German records which depicted the Nazi persecutions and murders

throughout Lithuania (G Series, X212-474).⁴ The Government admitted that none of the German records contains petitioner's name or indicates that the petitioner had in any way participated in any of the persecutions or killings. (Admission No. 26, A573).

The Government's Statement further erroneously states that "... petitioner's visa application listed his occupation as dental technician [J.A. 30]; it did not reveal his position as a bank employee and the supervisor of a factory during the Nazi occupation of Lithuania" (U.S. BR. 6). Yet, the Application For Immigration Visa (Quota) of petitioner does not even ask for wartime occupations. The only space to be filled in as to occupation calls for a statement in the present tense only, "That my calling or occupation is", to which the petitioner correctly answered "dental technician" (J.A. 30). On January 14, 1947 the Fellbach Police Chief certified to the American Consulate the good conduct of petitioner, "the dental-technician." (J.A. 37). The petitioner also submitted to Vice Consul Frank K. Schilling his internal Lithuanian passport, dated March 26, 1944, which correctly revealed his then "Occupation Office-worker," as translated by the Government (J.A. 28).

Not even the Alien Registration form required petitioner to list his job as a bookkeeper with the Bank of Lithuania in 1941. In part 9, petitioner accurately listed his "usual" and "present" occupation as dental technician. Part 10(a) inquired, "I intend to be engaged in the following activities in the United States" to which he

⁴ The only Government witness to testify at the trial pertaining to the Nazi persecutions and killings was an historian, Raul Hilberg, who gave "historical" testimony and discussed his reconstruction of the contents of the German war records. He had no knowledge of petitioner. (A432-433).

answered "unknown". Part 10(b) inquired "I have been within the past 5 years, engaged in the following *activities*" to which he answered on January 9, 1947 "student, dental technician, farmer and forestry work". (J.A. 34-35) (emphasis added). The only other "activity" petitioner engaged in from January 1942 to January 1947 was being a clerk-bookkeeper in a brush and broom shop, which has no conceivable connection to aiding the Nazi war effort or participation in atrocities.

The Court of Appeals was not clearly erroneous in holding that any alleged omission of petitioner's wartime occupation at the visa stage was not "material" under *Chaunt* and in agreeing with the District Court's finding that petitioner was no more than a clerk-bookkeeper in a brush and broom shop in Kaunas during the Nazi occupation (Pet. App. 35a). Indeed, the District Court expressly found that, "Professor Finger also testified he would not have denied a visa even to a manager of a 15 employee brush and broom factory. . ." (Pet. App. 119a).

The Government, thus, is misdirected in focusing on partial "omissions" of wartime occupations and residences and in misconstruing *Fedorenko* as requiring this Court as its standard of review to make a *de novo* review of the record in every denaturalization case. This Court has indicated it would review the entire record when it was "important to the liberty of the citizen." *Chaunt v. United States*, 364 U.S. 350, 352-353 (1960); *Costello v. United States*, 365 U.S. 265, 269 (1961); and *Fedorenko v. United States*, *supra* at 756, n.11, 12.

III. The Requirements For Proving False Swearing, Perjury or Lack Of Good Moral Character Under Other Statutes Do Not Govern The Standard For Proving Materiality Under The Denaturalization Statute

The Government seeks to rationalize a diluted standard of proof of materiality, which would not even require the

existence of an ultimate disqualifying fact, by citing to other statutes which provide criminal penalties for making false statements and then falsely concludes it would be anomalous to require a higher standard of materiality for denaturalization than for criminal prosecution for making false statements. (U.S. BR. 14-15, 24-28). The Government has made the same argument and cited to the same perjury statutes and many of the same pre-*Fedorenko* cases, which this Court found unpersuasive in *Fedorenko v. United States*, 449 U.S. 490 (1981). (See *Fedorenko* U.S. BR. 15, 36-38).

The "grave consequences" incident to denaturalization, which could involve the ultimate severity of death in the instant case, were strongly emphasized by this Court in *Klapprott v. United States*, 335 U.S. 601, 612 (1948), in pointing out that,

"This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. . . . 'It may result also in loss of both property and life; or of all that makes life worth living. *Ng Fung Ho v. White*, 259 U.S. 276, 284.' "

While the exposure to a fine and maximum imprisonment of 5 years for perjury or false swearing is indicative of their serious nature, they pale in significance to the grave consequences of denaturalization. If there is any anomaly it is that the defendant in such criminal cases, who is subject to substantially less severe consequences, has the greater constitutional protections of trial by jury, of the charges in an indictment, returned by a grand jury, the privilege against self-incrimination and the presumption of innocence. There is no anomaly that the Government is required under the denaturalization statute to prove materiality of a misrepresentation by evi-

dence that is doubt free in a non-jury trial. *Chaunt v. United States*, *supra* at 352-353.

In its opinion in *Fedorenko* [587 F.2d 946 (1979)], the Fifth Circuit Court of Appeals recognized the doubt-free test, but enigmatically held that *Chaunt* requires only that the investigation "might have" uncovered other facts warranting denial of citizenship. This Court rejected the Fifth Circuit's mere "possibility" interpretation of *Chaunt* in *Fedorenko*. The Government nevertheless has reasserted the mere "possibility" test in its Brief herein. (U.S. BR. 16-28, 44).

In his concurring opinion in *Fedorenko*, Justice Blackmun gave the reason the Court rejected the holding of the Fifth Circuit, in stating,

"... I must join the Court in not accepting the reasoning of the Court of Appeals, which would have diluted the materiality standard. . . By concluding that the Government has demonstrated the actual existence of disqualifying facts—facts that themselves would have warranted denial of petitioner's citizenship—this Court adheres to a more rigorous standard of proof.

... Application of [the Court of Appeals'] standard suggests that a deliberately false answer to any question the Government deems worth asking may be considered material. I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt*.

Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases and that its 'two tests' are simply two methods by which the existence of ultimate disqualifying facts might be proved."⁵ (490 U.S. at 523-524).

⁵ Justice Blackmun noted that, "[T]he 'second [*Chaunt*] test' simply asks whether knowledge of the suppressed facts could have enabled the Government to reach the ultimate disqualifying facts whose existence is now known." 490 U.S. at 525, n.15.

The majority opinion of this Court in *Fedorenko* cited with approval to the Ninth Circuit opinion in *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962), for the rule that "materiality of a false statement in a visa application must be judged in terms of its effect on the applicant's admissibility into this Country." 490 U.S. at 509.

That court of appeals was not persuaded by the Government's argument that Rossi's intentional misrepresentation and suppression of the truth in the course of the proceedings for naturalization prevented a proper investigation of his eligibility for citizenship and demonstrated a lack of good moral character to revoke his citizenship without regard to the effect true answers would have had on his application.

Although the Government quotes from Justice Marshall's opinion in *Fedorenko* as to the importance of false testimony in the naturalization process, the Government misconprehends the important distinction between naturalization and denaturalization cases as described in both *Berenyi v. District Director*, 385 U.S. 630, 636-637 (1967) and *In re Petition of Haniatakis*, 376 F.2d 728 (3d Cir. 1967).

Here the District Court properly concluded from its analysis of *Chaunt*, "that not all false statements or concealments made during the naturalization process will form a basis for revocation of citizenship, even when the person seeking citizenship made the false statements or concealments under oath," noting that "the *Chaunt* rule is reflected in the Third Circuit opinion in *United States v. Riela, supra*." (Pet. App. 127a).

With respect to the Government's attempt to graft the pre-naturalization Section 1101(f)(6) onto section 1451(a), petitioner did not provide immigration officials with a

false date and place of birth "for the purpose of obtaining any benefits," not otherwise available to him under the Immigration Act of 1924. Petitioner supplied the vice consul with his internal Lithuanian passport, dated April 26, 1944, (J.A. 26-29), which he obtained from an anti-Nazi resistance municipal employee who backdated his date of birth to October 4, 1913, thereby making him over 30 years old, and placing his birth in the City of Kaunas, rather than rural Reistru. (Lodging, 934-936, 950, A.1128). On April 22-23, 1943, German General Jackeln had threatened Lithuanian General Plechavius with the "harshest repressions" to Lithuanians if he failed to mobilize into the German Army 80,000 Lithuanians with an emphasis on youth led by Lithuanian officers (X1229, 1236, 1242-1243). Petitioner obtained the falsified passport to avoid being conscripted into the German Army as a young officer (presumably under 30 years old) and obviously believed he would be less likely to be conscripted by the Kaunas general as a native of Kaunas, rather than as a farm boy from Reistru. (Answer to Interrogatory 1). Petitioner also changed his street address to deter being rounded up by the Nazis (J.A. 29). At the time, petitioner was engaged in the underground activities of printing and distributing underground newspapers urging resistance to German mobilization. (Pet. App. 114a-115a). Thus, it was not the petitioner's purpose to gain an immigration benefit from perpetuating the information in his passport, since there was no advantage under the immigration laws to being two years older or being from a city. (Pet. App. 119a, 135a).

IV. Petitioner's Citizenship Was Not Illegally Procured

The District Court ruled that petitioner had not "illegally procured" his citizenship under 8 U.S.C. § 1451(a), since none of his false statements or omissions, "both singly

and in the aggregate," were "material." (Pet. App. 122a-124a). The Third Circuit also rejected the arguments of the Government that either "any misrepresentation" or a "pattern of misrepresentations" was a sufficient showing of lack of good moral character based on the false testimony provisions of 8 U.S.C. § 1101(f)(6) for purposes of denaturalization, and held that,

"We adopt the view, heretofore articulated in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (10th Cir. 1983), and impliedly accepted in *Haniatakis*, 376 F.2d at 731, and in *Maikovskis v. I.N.S.*, 773 F.2d 435, 440-41 (2d Cir. 1985), that the *Chaunt* materiality test is invoked when the government attempts to denaturalize a citizen based on the false testimony provisions of section 1101(f)(6). We believe this disposition is consistent with the Court's decisions in both *Chaunt* and *Fedorenko* Consequently, our analysis under the 'concealment of a material fact or willful misrepresentation' portion of section 1451(a) will be no different than that under the illegal procurement provision. We will not permit the government to escape the *Chaunt* materiality requirement by invoking section 1101(f)(6)." (Pet. App. 27a-28a).

Nevertheless, the Government persists in its attempt to engraft upon the words "illegally procured" a meaning which could never have been intended by the Congress, and which is contrary to the 1981 decision of this Court in *Fedorenko v. United States*, *supra*. (U.S. BR. 45-48, see also 8, 11, 17, 23-28, 42-44).

As originally adopted in 1952, 8 U.S.C. § 1451(a) provided for denaturalization only upon a finding that citizenship was "procured by concealment of a material fact or by willful misrepresentation." Subsequently that section was amended in 1961 to add "illegal procurement" as an additional ground for denaturalization,⁶ although there is

⁶ When petitioner applied for citizenship on October 23, 1953 and was granted citizenship in February 1954, "illegal pro-

still the overlapping and identical requirement of materiality to the extent of any misrepresentation as held in *Fedorenko, supra*.

If the additional ground for denaturalization ("illegal procurement") were intended by implication to include *all* misrepresentations, *whether or not material*, then the statute would not have continued to provide the material fact concealment's language since such language would have been surplusage. Obviously the Congress in amending the statute did not intend to render meaningless the conditions attached to denaturalization based upon a misrepresentation or concealment. On the contrary, restoration of the "illegal procurement" ground for denaturalization was clearly intended to provide a mechanism for dealing with jurisdictional and status defects not based upon any misrepresentation or concealment.

On June 21, 1961, the Justice Department wrote to the Chairman of the Committee on the Judiciary with respect to proposed amendments of the denaturalization provisions of the Immigration and Nationality Act concerning substituting a diluted, mere "preponderance of the evidence" burden of proof for the doubt-free test, and with respect to restoring the ground of illegal procurements to exclude aliens "afflicted with any dangerous contagious disease." (Reply App. 1a-3a). Deputy Attorney General Byron R. White presented the Government's views that,

"Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels

(Continued from previous page)

curement" was not part of the McCarren Act; 8 U.S.C. § 1451(a), and the petition referred only to the then statutory standard of "concealment of material fact." (J.A. 42). The 1961 amendment is silent as to any retroactive application. 1961 U.S. Code Cong. & Admin. News 729.

that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in its retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals or other undesirables. The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act. In these circumstances, the Department does not feel that sufficient reasons exist for change." (*id.*, at 2a).

This Court has not departed from its holding that the denaturalization provision applies only to a willful misrepresentation of a material fact. *Costello v. United States*, 365 U.S. 265, 271-272, n. 3 (1961); *Fedorenko v. United States*, *supra*.

The "false statement" statute referred to in *Fedorenko* and the statute upon which the Government relies here to show lack of good moral character use almost identical language prohibiting admissibility to anyone "giving false testimony for the purpose of obtaining benefits under the Act." 8 U.S.C. § 1101(f)(6). But, here the petitioner did not make any misrepresentations "for the purpose of obtaining benefits under the Act," not otherwise available to him, since there was no advantage to being two years older or being born in a city instead of a rural town, nor any disadvantage from residing in Kedainiai or working as a bookkeeper for purposes of obtaining an immigration quota visa based on his country of natural origin, as the District Court expressly found. (Pet. App. 119a, 135a).

In any event, the 1961 Amendment to § 1451(a) can not be applied retroactively to denaturalize petitioner from his 1954 grant of citizenship. Although the Seventh Circuit Court of Appeals held in *United States v. Kairys*, 782

F.2d 1374 (7th Cir. 1986), *cert. denied* May 22, 1986, that the 1961 amendment applies to citizens who had already obtained their status before its enactment, that court of appeals in doing so departed from several of this Court's settled canons of statutory construction, including the "first rule" of statutory construction that an enactment should never be applied retroactively unless by clear and unequivocal language the legislature has manifested an unmistakable intent to do so. *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

The plain fact, however, is that *nothing* in the 1961 amendment or its legislative history suggests that Congress even considered, much less intended, retroactive application. See 75 Stat. 656 (1961); H.R. Rep. No. 1086, 87th Cong. 1st Sess. 38-40 (1961), *reprinted* in 1961 U.S. Code Cong. & Admin. News 2950, 2982-84; 107 Cong. Rec. 18,280-86 (1961) (House); 107 Cong. Rec. 19650-57 (1961) (Senate). In 1952, Section 340(i) *freed* naturalized Americans from denaturalization for "illegal procurement," which had been a grounds for denaturalization before Congress enacted the Immigration and Nationality Act of 1952. Compare § 338(a) of the Nationality Act of 1940, 54 Stat. 1158-59 (1940), with INA § 340(a), 66 Stat. 260 (1952). Section 340(i) made the provisions of § 340(a) in which "illegal procurement" was deleted applicable to "naturalizations heretofore granted"—i.e., before 1952, when § 340(i) was enacted.⁷ Therefore, the actual terms of the 1952 provision would make the 1961 change restoring "il-

⁷ There is nothing in the legislative history of § 340(i) to suggest that the 1952 Congress or the Justice Department anticipated that, should a later Congress amend § 340(a), the later amendment would automatically apply retroactively. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted* in 1952 U.S. Code Cong. & Admin. News 1653; S. Rep. No. 1137, 82d Cong., 2d Sess. (1952).

legal procurement" applicable only to pre-1952 "naturalizations heretofore granted", and post 1961 citizenship, but not to petitioner's 1954 citizenship.

This Court has interpreted the Citizenship Clause to mean that, "[o]nce acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted, at the will of the Federal Government" *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967). (emphasis added). Whether or not denaturalization imposes "punishment" in a technical sense, the Government here certainly would impose on petitioner consequences "more grave than consequences that flow from conviction for crimes." *Klapprott*, 335 U.S. at 611. No more "harsh and oppressive" consequence can be imagined than to have one's American citizenship taken away, to be deported from the land where he has lived for almost forty years with his wife, and, as would likely be the case here, to be sent to the Soviet Union to be executed or sent to the Gulag for making the relatively innocuous misrepresentations of one's date and town of birth. The Citizenship Clause and the Due Process Clause forbid these consequences especially when the "illegal procurement" ground for denaturalization was not enacted until after petitioner's citizenship was obtained.

Respectfully submitted,

Donald J. Williamson
Counsel of Record for Petitioner

April, 1987

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.

June 21, 1961

Honorable Emanuel Celler
Chairman, Committee of the Judiciary
House of Representatives
Washington, D.C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 192, a bill "To amend sections 212, 310, 340, and 349 of the Immigration and Nationality Act."

The bill would amend by revision or addition certain provisions of the Immigration and Nationality Act. While the Department finds several of the amendments sought by the bill to be unobjectionable there are some provisions which it cannot support.

The provisions of the measure which the Department cannot support include subsection (c) of Section 4 which would substitute for the "clear, unequivocal, and convincing" evidentiary standard presently required to establish denaturalization the standard that denaturalization may be established by "a preponderance of the evidence." The same is true of the similar provision of section 5 regarding expatriation cases. Section 5 also would set forth as an evidentiary rule that one who has performed an act of expatriation shall be presumed to have done so voluntarily, permitting, however, the rebuttal of the presumption by a preponderance of the evidence. These provisions are

presumably intended to overrule the decisions of the Supreme Court in *Schneiderman v. United States*, 320 U.S. 118 (1943) (denaturalization) and *Gonzales v. Landon*, 350 U.S. 920 (1955), and *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (expatriation). The rationale of these cases is that because United States citizenship is such a precious right, no person should be deprived of it under the ordinary evidentiary rules prevailing in civil actions and that the Government must establish its case by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt." Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals, or other undesirables. The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act. In these circumstances, the Department does not feel that sufficient reasons exist for change.

Subject to the comments hereafter made with respect to section 1 relating to aliens afflicted with any dangerous contagious disease, we would have no objection to that section; or to section 2 relating to the admission of certain aliens afflicted with tuberculosis; or section 3 which would require that all naturalization proceedings be determined under the provisions of the Immigration and Nationality

Act; or to subsections (a) and (b) of section 4 which would restore "illegality" as a ground for denaturalization.

With respect to section 1 of the bill existing law provides that among the classes of aliens who shall be ineligible to receive visas and who shall be excluded from admission to the United States are "Aliens who are afflicted with tuberculosis in any form, or with leprosy, or any dangerous contagious disease." The bill would amend this provision by omitting the specific references to tuberculosis and leprosy but would continue to provide for the exclusion of aliens who "are afflicted with any dangerous contagious disease." Some of the diseases which are included within the term "any dangerous contagious disease" are set forth in the regulations of the United States Public Health Service (42 C.F.R. 34.2(b)). While the diseases presently designated do not include active tuberculosis or leprosy it is assumed that with the elimination of these two specific diseases from the ambit of section 212(a) of the Act, the Public Health Service will include them among the diseases embraced within the cited regulation. In such event there would be no objection to this amendment.

Subject to revision of the bill to eliminate the objectionable features discussed above, the Department of Justice would have no objection to its enactment.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administrator's program.

Sincerely yours,

Byron R. White

Deputy Attorney General

CHAPTER XXII SUPPLEMENT A

DOCUMENTATION OF ALIENS ENTERING THE UNITED STATES

The following regulations, relating to the admission of aliens into the United States, are established as notes to section XXII-1 of the Foreign Service Regulations of the United States. So far as they relate to the administration by consular officers of the Immigration Act of 1924, as amended, the regulations are prescribed by the Secretary of State on the recommendation of the Attorney General, under the authority of section 24 of the act cited.

Effective September 10, 1946

CODE OF FEDERAL REGULATIONS

The CFR citations at the end of the following notes are section numbers of the Code of Federal Regulations.

QUOTA IMMIGRANTS

NOTE 104. DETERMINATION OF QUOTA NATIONALITY.

(a) Section 12 of the act provides that for the purposes of the act the quota nationality of an immigrant shall be determined by the country of birth. The act further provides the following three exceptions to the general rule for the determination of the national quota to which a quota immigrant shall be charged:

- (1) A child under 21 years of age must be charged to the quota of the native country of the accompanying parent, or of the father when both parents accompany the child, regardless of the country of the child's birth

unless the child was born in a nonquota country. (See Note 92.)

(2) A wife may be charged to the quota to which her husband of a different quota nationality is chargeable, when the monthly quota to which she would ordinarily be chargeable is exhausted, provided that (a) she is accompanying him, (b) he is entitled to an immigration visa, and (c) the monthly quota to which he is chargeable is not exhausted.

(3) An immigrant born in the United States who has lost his American citizenship shall be considered as having been born in the country of which he is a citizen or subject, or if he is not a citizen or subject of any country than in the country from which he comes, which means the country of his residence or domicile.

(b) An alien husband who is a lawful permanent resident of the United States may go abroad in order to confer upon his wife and his minor children the benefits of his quota nationality. The husband in such a case may return with a reentry permit, a nonquota immigration visa issued under section 4(b) of the act, a resident alien's border-crossing identification card in an appropriate case, or without any document if he is entitled to reenter the United States without documentation.

(c) An immigrant born of a father who had a diplomatic status or immunity at the time of the immigrant's birth is chargeable to the quota of the father's nationality (if the father was in the service of the country to which he owed allegiance), regardless of the country in which the immigrant was born.

(d) The case of an immigrant born on the high seas and not specifically entitled to nonquota status under any provision of the act or these regulations, and whose classi-

fication as a quota immigrant is not provided for in these regulations, should be referred to the Department for special instructions.

(22 CFR 61.250)

NOTE 105. FIRST-PREFERENCE CATEGORIES

Section 6 of the act provides that 50 percent of each quota shall be made available for aliens who are the parents of citizens of the United States, such citizens being 21 years of age or over, and for aliens who are husbands of citizens of the United States of any age by marriages occurring on or after July 1, 1932, and, in quotas of 300 or more, for quota immigrants who are skilled in agriculture, their wives, and dependent children under 18 years of age, if accompanying or following to join them. This section is not applicable to Chinese persons or to aliens racially ineligible to naturalization in the United States. (22 CFR 61.251)

NOTE 108. SECOND-PREFERENCE CATEGORY.

(a) Section 6 of the act provides that the second 50 percent of each quota plus any portion of the first 50 percent not required for the issuance of immigration visa to first-preference immigrants shall be made available for the unmarried children, under 21 years of age, and the wives of aliens who are lawful permanent residents of the United States. No petition procedure is prescribed by the act to establish second-preference status.

(b) Second preference under a quota is not available to Chinese persons or to aliens racially ineligible to naturalization.

(22 CFR 61.254)

NOTE 119. ISSUANCE OF QUOTA VISAS OUT OF TURN.

Under no circumstances should an applicant for a quota immigration visa be issued such a visa out of his proper turn with other qualified applicants in the same category, as this would have the effect of according the applicant an unauthorized preference over other qualified applicants having earlier priority. However, first priority over all nonpreference quota immigrants is provided for the immigrants mentioned in Notes 204(b), 205(c), and 221(f). (22 CFR 61.301)

NOTE 137. IMMIGRATION - VISA APPLICATION FORM.

Applications for immigration visas shall be made in duplicate on Forms 256a and 256b, which provide for the classification of each applicant as a quota or a nonquota immigrant and for the subclassification of each applicant as a first-preference-quota, second-preference-quota, or nonpreference-quota immigrant. Space is also provided for the classification of an immigrant not falling within any of the categories above mentioned. Supplies of the official immigration-visa application forms may be obtained upon requisition from the Department. (22 CFR 61.319)

NOTE 138. EXCLUDING PROVISIONS OF LAW TO BE EXPLAINED TO APPLICANTS.

An alien must state in his application for an immigration visa whether or not he is a member of any of the classes excluded under the immigration laws, which classes

are listed in the application. As the action to be taken on an application for an immigration visa may depend to a large extent upon the applicant's statements in this respect, the consular officer should be careful to see that before taking the oath the applicant fully understands the meaning of the excluded classes listed in the application. Consular officers should be prepared, upon the request of the applicant, to explain to him the pertinent excluding provisions of the law. The penalty for swearing falsely should be explained to an applicant if such action is deemed to be desirable. (22 CFR 61.320)

NOTE 145. SUPPORTING DOCUMENTS TO BE ATTACHED TO IMMIGRATION VISAS.

(a) Documents in duplicate which are required of an applicant under section 7(c) of the act and which are to be attached to his visa application are copies of public records "kept by the Government to which he owes allegiance", which are ascertained to be "available". The records may be those of the municipal, provincial, or national authorities. If the applicant is in possession of only one copy of any of the required documents a certified duplicate or photostatic copy of the original may be made from that copy.

(b) With reference to the term "dossier" there should be required any available official document showing an applicant's police record. Section 7(c) of the act requires the presentation of two copies of a dossier (or police record) from the country to which an alien owes allegiance. However, in view of the provisions of section 23 of the act an alien may be required to present similar evidence from

any other country in which the consular officer knows or has reason to believe the alien may have a record.

(c) With reference to the term "prison record" there should be required any available official document showing whether an applicant has been incarcerated in a penal institution.

(d) With reference to the term "military record" there should be required any available official document setting forth the applicant's record while serving with the military forces. (This does not refer to those personal documents, such as a discharge certificate or enrollment book, which are issued to remain in the individual's possession, although the consular officer may require an applicant to exhibit such a document for inspection if it is available and if it is deemed to be necessary to establish the applicant's identity or admissibility into the United States under the immigration laws.)

(e) The term "birth certificate" means a certificate issued by the custodian of records of births in the country of an applicant's birth and the names of the parents. A consular officer is to require and to attach to the visa application any other available satisfactory documentary evidence of birth if a birth certificate is not available and such evidence is necessary to establish an applicant's place or date of birth or parentage. In such a case a memorandum regarding the date and place of the applicant's birth as shown in any passport or other travel document he may have in possession should be attached to the visa.

(f) The phrase "all other available public records" as used in section 7(c) of the act, refers to available official

records necessary for the identification of an applicant or the determination of his admissibility into the United States under the immigration laws. A copy of the marriage record, for example, may or may not, according to the circumstances of the particular case, be a requisite document.

(g) When copies of public records kept by a government other than that to which an applicant owes allegiance are ascertained to be available and are necessary to establish an applicant's identity or admissibility into the United States under the immigration laws, as in the case of an applicant who has formerly owed allegiance to another government or of an applicant who is residing in a country other than the one to which he owes allegiance, the consular officer should require such documents and attach them to the original and duplicate copies of the visa application. (22 CFR 61.327)

NOTE 148. PRELIMINARY EXAMINATION OF DOCUMENTS.

(a) In communicating with a prospective immigrant who desires to apply for a visa, a consular officer, after advising the alien of the documentary and other requirements, may inform the alien that a preliminary examination will be made of such documents as he may submit, preferably by mail, at his own risk, and may state that he will advise the alien at a later date whether the documents appear to be sufficient and satisfactory so far as can be ascertained in advance of the required personal appearance of the applicant at the consular office to execute a formal application for a visa.

. . .

(c) When informing an alien that his documents appear to be sufficient and satisfactory, it should be added that no assurance can be given that a visa will be granted until the alien has personally appeared at the consular office, has been examined, and has been found to be eligible to receive a visa under the immigration laws and regulations. The alien should also be advised to present himself promptly at the consular office for visa examination, as new or additional documents may be required of him to meet any change which may occur in the circumstances of his case.

(d) If the documents submitted are insufficient or unsatisfactory, the letter informing the alien should advise him in what respects they are insufficient or unsatisfactory and that he may present such other documents as he may desire to submit. A suggestion that further documents may be submitted, however, would not be appropriate if the alien is found to be inadmissible into the United States on some ground which cannot be overcome by the submission of further documents.

(e) It is considered to be advisable for consular officers to retain the documents submitted in any case, pending the personal appearance of the applicant. (22 CFR 61.330)

NOTE 169. REFUSAL CARDS.

(a) Upon the refusal of an immigration visa, either formal or informal, on security grounds, and mandatory immigration grounds such as, for example, because the alien is found to be inadmissible into the United States on an offense involving moral turpitude, or because he is suf-

fering from a class-A medical defect, etc., visa refusal cards (Form 247) should be prepared in sufficient number to provide *one* copy to be retained in the files of the office of application, *one* copy to be sent to the supervisory consulate general or other central clearing office in the country of application, *one* copy to be sent to the central clearing office in the country of the alien's birth, and *one* copy to be sent to the central clearing office in the country of the alien's nationality. Fewer cards would, of course, have to be made in the case of an alien who, for example, applies in the country of his birth and nationality. Offices preparing or receiving such cards should arrange or file them in readily accessible order as promptly as possible.

(b) It is not necessary to prepare cards covering refusals of visas upon grounds which may possibly be overcome by *bona-fide* changes in the facts of a case or by the presentation of further documentary evidence of the true facts, as in the case of an alien initially considered likely to become a public charge, or an alien believed to be a contract laborer, or an alien suffering from a class-B medical defect. If it is suspected that fraud may be attempted at another office, the necessary refusal cards should be prepared and distributed.

(22 CFR 61.351)

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MAR 4 1987

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No. 86-228

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JUOZAS KUNGYS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**MOTION FOR LEAVE TO FILE AND BRIEF OF THE
WORLD JEWISH CONGRESS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT UNITED STATES**

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UNITED STATES OF AMERICA,
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**On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

**MOTION OF THE WORLD JEWISH CONGRESS
FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
IN SUPPORT OF RESPONDENT UNITED STATES**

The World Jewish Congress, pursuant to Rule 36.3, hereby moves for leave to file the attached brief *amicus curiae* supporting the respondent in *Kungys v. United States*, No. 86-228. Consent to file this brief has been obtained from counsel for respondent; a letter expressing that consent has been lodged with the Clerk of the Court. *Amicus* tried to obtain petitioner's consent, but was unsuccessful. Because *amicus* has been unsuccessful in its efforts to obtain consent from the petitioner, this motion is necessary.

(i)

The background and concerns of *amicus* are fully set forth in the Interest of *Amicus Curiae* section of the attached brief. In sum, the World Jewish Congress has long been active in combatting racial and religious persecution and in ensuring that the United States immigration laws are fairly implemented and interpreted, particularly with a view toward rescuing the victims of such persecution. *Amicus* thus has a special interest in assisting the Court to interpret and enforce the immigration laws so that they are used to confer immigrant status and citizenship only upon those individuals whom the United States Congress has decided are worthy of receiving same. In particular, *amicus* believes that U.S. immigration laws were not intended to grant these privileges to individuals who, like petitioner, make material misrepresentations in their applications for immigration and naturalization and who masquerade as victims of Nazi persecution.

Amicus believes that misrepresentations of fact willfully made by petitioner in his visa application and in his petition for citizenship were demonstrably material and, accordingly, that his citizenship must be revoked. *Amicus* submits that the standard of "materiality" advocated by petitioner threatens the integrity and orderly operation of an immigration system that has rescued millions of people from ongoing or threatened racial, religious or political persecution.

Amicus brings to the issues in this case experience and perspectives likely to be different from those of the parties. This is especially true since many members of *amicus'* constituent organizations are escapees from Nazi persecution who later were lawfully admitted to U.S. residence and citizenship, and/or are relatives of people who lost their lives as a consequence of World War II crimes similar to those that petitioner is alleged to

have committed. *Amicus* now respectfully seeks the Court's leave to file the attached brief on the merits.

Respectfully submitted,

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March 4, 1987

QUESTIONS PRESENTED

1. Whether, under the "second prong" of *Chaunt v. United States*, 364 U.S. 350 (1960), the government, in order to prove that a misrepresentation or concealment is "material" under 8 U.S.C. 1451(a), must prove the existence of ultimate facts warranting denial of citizenship, or instead may prevail upon proving that the true facts, or discovery of the concealment or misrepresentation, would have prompted an investigation possibly leading to the discovery of specific facts, which facts were capable of influencing the decision on the applicant's visa application or naturalization petition.

2. Whether certain misrepresentations of fact willfully made by petitioner in his visa application and in his citizenship petition and allied documents are "material," hence requiring his denaturalization under 8 U.S.C. 1451(a).



TABLE OF CONTENTS

	Page
MOTION OF THE WORLD JEWISH CONGRESS FOR LEAVE TO FILE A BRIEF AMICUS CU- RIAE IN SUPPORT OF RESPONDENT UNITED STATES	i
QUESTIONS PRESENTED	v
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	ix
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
PETITIONER SHOULD BE DENATURALIZED BECAUSE OF HIS WILLFUL MISREPRESENTEN- TATIONS OF MATERIAL FACTS	6
I. A MISREPRESENTED FACT IS MATERIAL IF DISCLOSURE OF THE TRUTH MIGHT HAVE BEEN USEFUL IN AN INVESTIGA- TION POSSIBLY LEADING TO THE DIS- COVERY OF OTHER FACTS WARRANT- ING DENIAL OF CITIZENSHIP	7
A. The Materiality Standard of 8 U.S.C. 1451(a) Does Not Require Proof of Ulti- mate Facts Warranting Denial of Citizen- ship	7
B. A Willful Misrepresentation or Concealment Should be Deemed "Material" Under 8 U.S.C. 1451(a) if Disclosure of the True Facts or Discovery of the Misrepresentation or Concealment Would Have Prompted an Investigation Possibly Leading to the Dis- covery of Specific Facts, Which Facts Were "Capable of Influencing" the Decision on the Applicant's Visa Application or Nat- uralization Petition	11

TABLE OF CONTENTS—Continued

	Page
II. PETITIONER'S WILLFUL MISREPRESENTATIONS WERE MATERIAL UNDER THE SECOND PRONG OF CHAUNT	15
A. The District Court Acknowledged that the Government's Investigation of Petitioner, Conducted Forty Years After the Events in Question, Succeeded in Adducing Strong Evidence of Petitioner's Complicity in Nazi Atrocities, Which Petitioner's Misrepresentation of Wartime Residence "Tended to Corroborate"	15
B. Had Petitioner's Willful Misrepresentations Been Discovered in 1947 or 1953, the Resulting Investigation Would Have Had an Even Greater Chance of Discovering, at a Minimum, the Same Strong Evidence Linking Petitioner to Mass Killings	16
C. Discovery of Strong Evidence of Petitioner's Complicity in Nazi Atrocities Would Plainly Have Been "Capable of Influencing" Official Action on Petitioner's Visa Application and Naturalization Petition, and Accordingly, the Misrepresentations that Prevented the Timely Discovery of Such Evidence are "Material" Under 8 U.S.C. 1451 (a)	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:	Page
<i>Brandow v. United States</i> , 268 F.2d 559 (9th Cir. 1959)	13
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960).... <i>passim</i>	
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979)	8
<i>Corrado v. United States</i> , 227 F.2d 780 (6th Cir. 1955), <i>cert. denied</i> , 351 U.S. 925 (1956).....	8
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981) ..	7, 11, 14
<i>Ganduxe y Marino v. Murff</i> , 183 F. Supp. 565 (S.D.N.Y. 1959)	9
<i>Kassab v. INS</i> , 364 F.2d 806 (6th Cir. 1966)	9, 10
<i>Klapprott v. United States</i> , 335 U.S. 601 (1949) ..	10
<i>Landammer v. Hamilton</i> , 295 F.2d 642 (1st Cir. 1961)	9
<i>Robles v. United States</i> , 279 F.2d 401 (9th Cir. 1960), <i>cert. denied</i> , 365 U.S. 836 (1961)	12
<i>TSC Industries, Inc. v. Northway, Inc.</i> , 426 U.S. 438 (1976)	11, 13
<i>Tzantarmas v. United States</i> , 402 F.2d 163 (9th Cir. 1968), <i>cert. denied</i> , 394 U.S. 966 (1969)....	12
<i>United States v. Abrams</i> , 568 F.2d 411 (5th Cir. 1978)	12
<i>United States v. Chandler</i> , 152 F. Supp. 169 (D. Md. 1957)	9
<i>United States v. D'Agostino</i> , 338 F.2d 490 (2d Cir. 1964)	10
<i>United States v. DiFonzo</i> , 603 F.2d 1260 (7th Cir. 1979)	12
<i>United States v. Fedorenko</i> , 597 F.2d 946 (5th Cir. 1979), <i>aff'd</i> , 449 U.S. 490 (1981)	9
<i>United States v. Gremillion</i> , 464 F.2d 901 (5th Cir.), <i>cert. denied</i> , 409 U.S. 1085 (1972).....	12
<i>United States v. Jackson</i> , 640 F.2d 614 (8th Cir. 1981)	12
<i>United States v. Kungys</i> , 793 F.2d 516 (3d Cir. 1986)	6, 11, 15, 17, 18
<i>United States v. Kungys</i> , 575 F. Supp. 1208 (D. N.J. 1983)	16

x

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Kungys</i> , 571 F. Supp. 1104 (D.N.J. 1983)	15, 16, 18, 19
<i>United States v. Lichenstein</i> , 610 F.2d 1272 (5th Cir.), cert. denied, 447 U.S. 907 (1980)	13
<i>United States v. Lopez</i> , 728 F.2d 1359 (11th Cir.), cert. denied, 469 U.S. 829 (1984)	12, 13
<i>United States v. Lumantes</i> , 139 F. Supp. 574 (N.D. Cal. 1955)	9
<i>United States v. Montalbano</i> , 236 F.2d 757 (3d Cir.), cert. denied, 352 U.S. 952 (1956)	8
<i>United States v. Oddo</i> , 314 F.2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963)	9, 10
<i>United States v. Palciauskas</i> , 734 F.2d 625 (11th Cir. 1984)	9
<i>United States v. Ramos</i> , 725 F.2d 1322 (11th Cir. 1984)	12
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (10th Cir. 1983)	9
<i>United States v. Valdez</i> , 594 F.2d 725 (9th Cir. 1979)	12

STATUTES AND REGULATIONS:

Act of May 23, 1918 (40 Stat. 559), as amended by the Act of June 21, 1941 (55 Stat. 252) and Presidential Proclamation No. 2523 of November 14, 1941, 10 Fed. Reg. 8995, 8997, 9000 (1945)	18
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 <i>et seq.</i> :	
8 U.S.C. 1427(a)	18
8 U.S.C. 1429	18
8 U.S.C. 1451(a)	<i>passim</i>
Securities Exchange Act of 1934, § 14(a), 15 U.S.C. 78n(a), Rule 14a-9	11
18 U.S.C. 1001	12, 13
18 U.S.C. 1621	12
18 U.S.C. 1623	12
8 C.F.R. 175.52(a), 175.53(j), 175.53(k) (1947s) ..	18
22 C.F.R. 58 (1947s)	18

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:	Page
Appelman, <i>Misrepresentation in Immigration Law: Materiality</i> , 22 Fed. B.J. 267 (1962).....	9
Comment, <i>Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot</i> , 48 Fordham L. Rev. 471 (1980)	9
C. Gordon & H. Rosenfield, <i>Immigration Law and Procedure</i> (rev. ed. 1979)	9
<i>The New Webster's Comprehensive Dictionary of the English Language</i> (1985 ed.)	14



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-228

JUOZAS KUNGYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

**BRIEF OF THE
WORLD JEWISH CONGRESS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT UNITED STATES**

INTEREST OF AMICUS CURIAE

The World Jewish Congress ("WJC") is a not-for-profit voluntary association of representative Jewish organizations and national communities throughout the world. Many members of its constituent groups are victims of Nazi persecution and/or are relatives of persons who lost their lives as a consequence of World War II crimes similar to those petitioner is alleged to have committed. The WJC's constitution, adopted in 1936, provides that the organization exists to, *inter alia*, "foster the unity of the Jewish people, . . . ensure the continuity

and development of its religious, spiritual, cultural and social heritage . . . [and] to cooperate with all peoples on the basis of universal ideals of peace, freedom, and justice." The WJC has a long tradition of combatting racial and religious persecution and prejudice and of fighting for universal respect for human and political rights.

The United States has traditionally been a haven for refugees from persecution and intolerance in other lands. As noted by the Third Circuit Court of Appeals, petitioner herein procured his immigration to the United States by masquerading as a victim of Nazi persecution and by willfully misrepresenting and concealing his true identity and wartime whereabouts and activities. Petitioner himself is alleged to have been a participant in Nazi-sponsored acts of persecution, including mass murder. He would now have this Court validate his fraudulent entry and the U.S. citizenship he later obtained on the basis of that entry.

Amicus strongly believes that the position advanced by petitioner makes a mockery of the rule of law, debases the suffering of the true victims of the Nazi regime, and threatens fundamentally the integrity and the orderly operation of the United States immigration system, one that has rescued millions of innocent people from the clutches of those who would persecute, enslave and even kill them.

SUMMARY OF ARGUMENT

I.

A. Citizenship that is procured either illegally or through a willful misrepresentation or concealment of a material fact must be revoked under the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a). As the Third Circuit correctly held below, petitioner's citizenship must be revoked because it was procured by willful misrepresentations and concealments of material facts.

In the leading case on the definition of "material" under this statute, the Court held that concealed or misrepresented facts are material if they either would have been sufficient to warrant denial of citizenship (the test's "first prong") or their disclosure "*might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship" (the "second prong"). *Chaunt v. United States*, 364 U.S. 350, 355 (1960) (emphasis added).

Petitioner's argument that the "second prong" of *Chaunt* requires proof of an ultimate disqualifying fact goes against the nearly unanimous weight of judicial authority, is contrary to the best judgment of all leading commentators, would render the fraud provision of 8 U.S.C. 1451(a) entirely superfluous, and would actually encourage fraud, thereby dealing a grievous blow to Congress' demonstrated intent to discourage fraud in immigration and naturalization proceedings.

The vague and imprecise language of *Chaunt* has caused much confusion as to precisely what the government must prove, short of an ultimate disqualifying fact, in order to prevail. Courts have consistently avoided articulating a specific standard or test to be used in applying the second prong of *Chaunt* to cases of willful misrepresentations or concealments unaccompanied by conclusive proof of ultimate disqualifying facts.

B. *Amicus* submits that the proper standard can and should be fashioned from the extensive body of jurisprudence on the meaning of the expression "material misrepresentation" in analogous areas of federal law, where Congress, as in 8 U.S.C. 1451(a), has failed to provide its own definition. The basic materiality test that has long predominated throughout federal law has proven fair, workable and free of confusion. That test, in such areas as securities law and criminal law (including, most comparably, prosecutions for visa fraud), requires proof that the willfully misrepresented or concealed fact was

"capable of influencing" the decision in question. Applied to the second prong of *Chaunt*, the test would deem misrepresented facts material if the true facts (or discovery of the misrepresentation) would have prompted an investigation possibly leading to the discovery of specific facts, which facts were capable of influencing the decision on the applicant's visa application or naturalization petition.

Because the criminal statutes provide criminal sanctions, their definition of "material" should, if anything, be narrower than the definition used in the immigration field. To hold otherwise would lead to the absurd result that one who willfully makes an important misrepresentation in the course of applying for immigration could be immune from the civil consequence of denaturalization while subject to criminal penalties, including imprisonment, for the very same misrepresentation.

The test proposed by *amicus* is fully consistent with the language of the second prong of *Chaunt* and with the pre-*Chaunt* rule (which required proof of misrepresented or concealed facts that forestalled an investigation relevant to eligibility). It is, moreover, faithful to the Court's instruction in *Chaunt* itself that the "totality of the circumstances" should be taken into consideration when assessing materiality and to the common sense understanding that a "material" fact is one that is "important" to the decision-making process. The test, by definition, would still protect persons who make minor or unimportant, albeit willful, misrepresentations. Moreover, the expression "capable of influencing the decision" presumes the existence of a reasonable basis for the official's decision under the substantive provisions of the immigration and naturalization laws.

II.

Applying the appropriate standard, it is clear that petitioner's willful misrepresentations were material under the second prong of *Chaunt*. Because the district

court excluded from evidence the testimony of eyewitnesses identifying petitioner as a participant in the 1941 mass killing of unarmed Jewish civilians at Kedainiai in Nazi-occupied Lithuania, the court was unable to determine conclusively whether he had taken part in these killings. However, the court, while acknowledging that enormous difficulties are involved in proving details of events that took place in wartime Europe, held that the government's investigation, conducted four decades after the fact, had actually succeeded in locating witnesses whose testimonies provide "strong support" for the charge of petitioner's complicity in the massacre, and that the government "might have" proved this charge at trial had the depositions been admitted in evidence. In its subsequent decision denying petitioner's motion for an award of attorneys' fees, the court further held that the government had had a "reasonable basis" for believing that it could prove its charges at trial by the requisite "clear, unequivocal and convincing" proof that "does not leave the issue in doubt."

Former U.S. officials gave un rebutted testimony at trial that had petitioner's misrepresentations been discovered when petitioner applied for immigration (1947) or citizenship (1953), at a minimum an investigation would certainly have been commenced. It follows naturally that if the government's investigation commenced forty years after the war could uncover such strong evidence of petitioner's participation in mass killings, then an investigation conducted so soon after the war would have been even more likely to have found, at a minimum, the same "strong evidence" providing a "reasonable basis" for concluding that petitioner participated in Nazi atrocities, and hence that he was ineligible for immigration (under federal regulations barring such aliens from entry) and for citizenship as well (under federal statutes prohibiting the admission to citizenship of persons who entered the country unlawfully or who lack the requisite good moral character). Moreover, this

"strong evidence" of involvement in Nazi atrocities would have provided an alternate "reasonable basis" for concluding that petitioner had failed to satisfy his burden of proving that he was eligible to enter the United States, as non-preference visas were to be issued only to "victims of Nazi persecution."

The foregoing facts are plainly "material" under the definition of "materiality" employed in all analogous areas of federal law—which, as demonstrated above, is the definition that should govern the application of *Chaunt* as well. A reasonable vice-consul or naturalization examiner—i.e., one who was making a good faith effort to enforce U.S. law—would surely have found them to be, at the very least, "important" and "capable of influencing" his decision.

ARGUMENT

PETITIONER SHOULD BE DENATURALIZED BECAUSE OF HIS WILLFUL MISREPRESENTATIONS OF MATERIAL FACTS

This brief will not discuss a number of issues that *amicus* expects will be ably addressed in the government's brief.¹ This brief will focus instead on what *amicus*

¹ One of these concerns the applicability to the visa application stage of the same test of materiality that applies to the citizenship petition stage. Another issue is the correctness of the standard of review employed by the Third Circuit in reviewing the district court's factual findings. *Amicus* wishes to associate itself fully with the views advanced by the government on both of these questions throughout the proceedings. *Amicus* similarly supports and will not seek to duplicate respondent's argument that the Third Circuit was correct in concluding that the government succeeded at trial in proving what the Court of Appeals characterized as "the *disqualifying* fact that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa" (*United States v. Kungys*, 793 F.2d 516, 531 (3d Cir. 1986) (emphasis added)), and that had petitioner told the truth, the discrepancies disclosed thereby would at least have resulted in an investigation that would "in all probability . . . have revealed" this fact and consequently "would have probably resulted in the denial of his

believes is the central question before the Court in this case—whether the so-called “second prong” of the materiality test of *Chaunt v. United States*, 364 U.S. 350 (1960), requires proof of ultimate facts warranting denial of citizenship. *Amicus* submits that it does not and that the second prong of *Chaunt* is satisfied when the government proves, by “clear, unequivocal and convincing evidence” that does not “leave the issue in doubt,” that disclosure of the true facts or discovery of the misrepresentation or concealment would have prompted an investigation possibly leading to the discovery of specific facts, which facts were “capable of influencing” the decision on the applicant’s visa application or naturalization petition.

I. A MISREPRESENTED FACT IS MATERIAL IF DISCLOSURE OF THE TRUTH MIGHT HAVE BEEN USEFUL IN AN INVESTIGATION POSSIBLY LEADING TO THE DISCOVERY OF OTHER FACTS WARRANTING DENIAL OF CITIZENSHIP

A. The Materiality Standard of 8 U.S.C. 1451(a) Does Not Require Proof of Ultimate Facts Warranting Denial of Citizenship

1. This case involves a suit brought by the government to revoke petitioner’s United States citizenship pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a), which establishes two separate grounds for denaturalization: (1) illegal procurement (*i.e.*, the applicant lacked one or more of the statutory prerequisites for citizenship at the time the petition for naturalization was granted)² or (2) willful concealment or misrepresentation of a material fact. *Chaunt v. United States*, 364 U.S. 350 (1960), is the leading case on what constitutes a “material” misrepresentation or concealment under that statute. In *Chaunt*,

[petition for naturalization]” *Id.* at 531 (citing *Chaunt v. United States*, 364 U.S. 350 (1960)).

² *Fedorenko v. United States*, 449 U.S. 490 (1981).

the Court held that concealed or misrepresented facts are material under 8 U.S.C. 1451(a) if they meet either of two tests: (1) the concealed or misrepresented facts, if known, would have warranted denial of citizenship or (2) "their disclosure *might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355 (emphasis added).

The first *Chaunt* test places a severe burden on the government to prove the existence of ultimate facts demonstrating that a person is ineligible for citizenship. Petitioner would have the Court hold that the second *Chaunt* test, like the first one, requires proof of an ultimate disqualifying fact. Plainly, this is not so.

The manifest purpose of the second *Chaunt* test is to permit denaturalization on the basis of fraud without the necessity of proving conclusively that the individual was ineligible for citizenship. This is not only the most logical explanation for the inclusion of the words "might" and "possibly" in the second *Chaunt* test, but it is also the only one that would avoid making the fraud portion of the denaturalization statute redundant, contrary to the axiom that a statute should not be construed in a manner that "render[s] one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Adoption of petitioner's standard would make the fraud provision superfluous; having proved an ultimate disqualifying fact, the government would, by definition, have established illegal procurement and would, therefore, never need to offer proof of any misrepresentation or concealment.

Prior to *Chaunt*, courts consistently held that misrepresentations were material whenever they forestalled an investigation relevant to eligibility.³ Significantly, *Chaunt*

³ See, e.g., *United States v. Montalbano*, 236 F.2d 757, 759-60 (3d Cir.), cert. denied, 352 U.S. 952 (1956) (facts "relating" to eligibility); *Corrado v. United States*, 227 F.2d 780, 784 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956) (facts "relating to" eligi-

did not purport to disturb this established rule, and the overwhelming weight of judicial authority since *Chaunt*, together with all the leading commentators, agree that *Chaunt* does not require the government to prove an ultimate disqualifying fact if it proves that the truth would have prompted an investigation relevant to eligibility.⁴

Adoption of petitioner's position that proof of ultimate disqualifying facts is always required would deal a grievous blow to Congress' demonstrated intent to discourage fraud in immigration and naturalization proceedings. If the government is forced to prove the existence of ultimate facts warranting denial of citizenship in every denaturalization proceeding, an applicant would have much to gain and nothing to lose by lying about his background in an effort to avoid an investigation into his past that might lead to a denial of entry or citizenship. Even if the applicant's lie is later discovered, the present case demonstrates in dramatic fashion that the

bility); *United States v. Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957) (facts "relating to" eligibility); *United States v. Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955) (facts "regarding" eligibility); *Ganduxe y Marino v. Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959) ("substantial question as to . . . eligibility") (deportation case).

⁴ See *United States v. Palciauskas*, 734 F.2d 625, 628 (11th Cir. 1984); *United States v. Fedorenko*, 597 F.2d 946, 947, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981); *Kassab v. INS*, 364 F.2d 806, 807 (6th Cir. 1966) (deportation case); *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); *Landgammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). See also 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 20.4b, at 20-14 (rev. ed. 1979); Appelman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed. B.J. 267, 271-72 (1962); Comment, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 Fordham L. Rev. 471, 491-93 (1980). The only case that clearly holds otherwise is *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983) (ultimate disqualifying facts required), which, for the reasons advanced above, *amicus* submits was incorrectly decided as a matter of law.

passage of time will have made it more difficult for the disqualifying facts to be uncovered and proved. Moreover, in the interim, the burden of proof will have shifted from the applicant to the government, which must demonstrate his or her ineligibility in a denaturalization proceeding by satisfying a burden of proof which the Court has held to be "substantially identical" to the "beyond a reasonable doubt" standard applicable in criminal cases.⁵ Fraud would almost always be handsomely rewarded under the interpretation of *Chaunt* urged by petitioner.

2. Clearly, then, the government may prevail upon a showing of something less than an ultimate disqualifying fact. That is, there are two ways to satisfy the second prong of *Chaunt*.⁶ No court, however, has ever articulated a *specific standard or test* to be used in applying the second prong of *Chaunt* to cases of willful misrepresentations unaccompanied by conclusive proof of ultimate disqualifying facts. Typically, courts confronting such situations simply repeat verbatim the imprecise wording of the second prong of *Chaunt* and then assert in conclusory terms that the misrepresentation in question was (or was not) "material."⁷ The result, as noted by the Third Circuit herein, has been that the second

⁵ *Klapprott v. United States*, 335 U.S. 601, 612 (1949) (burden on government in denaturalization cases "to prove its charges . . . by clear, unequivocal and convincing evidence which does not leave the issue in doubt . . . is substantially identical with that required in criminal cases—proof beyond a reasonable doubt").

⁶ The second prong of *Chaunt* hence may be seen as having, in effect, two legs—one in which an ultimate disqualifying fact is proved and the other in which some lesser showing suffices. In other words, an ultimate disqualifying fact, if proved, clearly satisfies the second prong of *Chaunt*, and, for the reasons advanced herein, so too does some lesser showing. The nature of this lesser showing is addressed *infra* at I(B).

⁷ See, e.g., *Kassab*, 364 F.2d at 807 (deportation case); *United States v. D'Agostino*, 338 F.2d 490, 491 (2d Cir. 1964); *Oddo*, 314 F.2d at 118.

prong of *Chaunt* remains an "elusive concept,"⁸ and the "confusion" that Justice Blackmun spoke of in *Fedorenko*, 449 U.S. at 521 n.4 (1981) (concurring opinion), continues to reign.⁹

B. A Willful Misrepresentation or Concealment Should Be Deemed "Material" Under 8 U.S.C. 1451(a) if Disclosure of the True Facts or Discovery of the Misrepresentation or Concealment Would Have Prompted an Investigation Possibly Leading to the Discovery of Specific Facts, Which Facts Were "Capable of Influencing" the Decision on the Applicant's Visa Application or Naturalization Petition

1. *Amicus* submits that the proper standard for applying the second prong of *Chaunt* should be fashioned from the extensive body of jurisprudence on the meaning of the expression "material misrepresentation" in analogous areas of federal law. The materiality test that has long predominated throughout federal law has proved fair, workable and free of confusion. Indeed, Congress' failure to provide any definition of "material" in 8 U.S.C. 1451(a) suggests that the word should be given this meaning, its ordinary statutory definition. For example, under Rule 14a-9 promulgated pursuant to Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a) (prohibiting proxy statements that are "false or misleading with respect to any material fact . . ."), the Court has held that an omitted fact is material if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Similarly, under the

⁸ *United States v. Kungys*, 793 F.2d 516, 526 (3d Cir. 1986).

⁹ Indeed, although the Court granted *certiorari* in *Fedorenko* primarily to resolve questions about the proper interpretation of *Chaunt*, the Court was unable to reach a consensus, and instead decided the case on illegal procurement grounds. *Fedorenko*, 449 U.S. at 521 n.4 (Blackmun, J., concurring).

perjury statutes, 18 U.S.C. 1621 (false statement as to "material matter") and 18 U.S.C. 1623 (false "material declaration" before a court or grand jury), a false statement made before a grand jury is "material" if it

would have the natural effect or tendency to influence, impede or dissuade the Grand Jury from pursuing its investigation The false statements need not actually impede the investigation.

United States v. Gremillion, 464 F.2d 901, 905 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972). See also *United States v. Jackson*, 640 F.2d 614, 616 (8th Cir. 1981) (test is whether the false testimony was "capable of influencing the tribunal on the issue before it"); *United States v. Abrams*, 568 F.2d 411, 420 (5th Cir. 1978) (same); *United States v. DiFonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979) (similar standard under 18 U.S.C. 1001, which is directed against any person who "knowingly and willfully falsifies, conceals or covers up" a "material fact" in a matter within the jurisdiction of a department or agency of the United States).

Most analogously, in the context of criminal prosecutions for visa fraud under 18 U.S.C. 1001 and 18 U.S.C. 1621, a misrepresented fact is "material" if it had "a natural tendency to influence or was capable of influencing the decision . . ." on the visa application. *Robles v. United States*, 279 F.2d 401, 404 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961).¹⁰ Tellingly, the courts have expressly held in these cases that it is *not* required that the government demonstrate "reliance," *i.e.*, that the misrepresentation "actually influenced or caused a

¹⁰ *Accord*, *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984) ("capacity" to influence decision); *United States v. Ramos*, 725 F.2d 1322, 1324 (11th Cir. 1984) (passport application); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *Tzantarmas v. United States*, 402 F.2d 163, 168 (9th Cir. 1968), *cert. denied*, 394 U.S. 966 (1969).

department or agency of the United States to act”
Id. at 404. *Accord Lopez*, 728 F.2d at 1362.¹¹

Because the criminal statutes discussed above provide criminal sanctions, their definition of “material” should, if anything, be *narrower* than in the immigration field. Yet the materiality standard for these criminal cases is significantly broader than the standard that petitioner would have the Court apply under 8 U.S.C. 1451(a). Petitioner’s position leads to the absurd result that although one who procures his citizenship by willfully making an important misrepresentation would be immune from the civil consequence of denaturalization unless “ultimate disqualifying facts” can be proven, he would be subject to criminal penalties, including imprisonment, for the very same misrepresentation. In other words, although the individual could be imprisoned for the offense, the likely “fruit” of his crime—his improperly procured citizenship—would be beyond the reach of the law. Congress can hardly have intended such a ludicrous outcome.

2. It follows that a willful misrepresentation made to federal immigration or naturalization authorities and/or to the naturalizing court would be “material” under 8 U.S.C. 1451(a) if disclosure of the true facts (or discovery of the misrepresentation) would have prompted an investigation possibly leading to the discovery of spe-

¹¹ The same rule applies in the criminal law area generally. *See, e.g., United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980) (proof that government was “actually influenced” by false statement not required under 18 U.S.C. 1001); *Brandow v. United States*, 268 F.2d 559 (9th Cir. 1959) (same, emphasizing “the intrinsic capabilities of the false statement itself”). Similarly, in the securities field, the Court has held that proof that an omitted fact is material “does not require proof of a substantial likelihood that the disclosure . . . would have caused the reasonable investor to change his vote.” *TSC Industries, supra*, 426 U.S. at 449.

cific facts, which facts were capable of influencing the decision on the applicant's visa or naturalization petition.

The test set forth above is fully consistent with the language of the second prong of *Chaunt* and with the pre-*Chaunt* rule, which, as noted previously, required proof of misrepresented or concealed facts that forestalled an investigation relevant to eligibility. It is, moreover, faithful to the Court's instruction in *Chaunt* itself that the "totality of the circumstances" should be taken into consideration when assessing materiality (*Chaunt*, 364 U.S. at 354), and to the common sense understanding that a "material" fact is one that is "important" to the decision-making process. See, e.g., *The New Webster's Comprehensive Dictionary of the English Language* 587 (1985 ed.) (defining "material" as, *inter alia*, "of substantial import; of much consequence; important"). The test proposed by *amicus* would for the first time place limits on the open-ended language of *Chaunt*'s second prong, which, on its face, is otherwise broad enough to encompass virtually any willful misrepresentation or concealment.

Significantly, the test set forth herein would properly prevent the penalization of persons who make minor or unimportant, albeit willful, misrepresentations. For, virtually by definition, no reasonable official could have found such misrepresentations, however purposefully made, important or capable of influencing a visa or naturalization decision. Moreover, the government would still, of course, have to prove that the misrepresentation was a willful one. *Fedorenko*, 449 U.S. at 507-08 n.28. In addition, here, as in the standards applicable to the criminal statutes discussed earlier, built into the test is the requirement that the decision by the vice-consul, naturalization examiner or naturalizing court must have a reasonable basis under the substantive provisions of the immigration and naturalization laws relating to eligibility for immigration and for admission to U.S. citizenship.

II. PETITIONER'S WILLFUL MISREPRESENTATIONS WERE MATERIAL UNDER THE SECOND PRONG OF CHAUNT

A. The District Court Acknowledged that the Government's Investigation of Petitioner, Conducted Forty Years After the Events in Question, Succeeded in Adducing Strong Evidence of Petitioner's Complicity in Nazi Atrocities, Which Petitioner's Misrepresentation of Wartime Residence "Tended to Corroborate"

Applying the appropriate standard, it is clear that petitioner's willful misrepresentations¹² were material under the second prong of *Chaunt*. The district court found that petitioner had willfully misrepresented on his visa application and on his naturalization petition his identity (specifically, his date and place of birth), his wartime occupation, and his wartime residence. The last of these misrepresentations was continued by petitioner throughout the trial of this action, during which he falsely denied to the district court that he had been present in Kedainiai during the time that more than 2,000 unarmed Jewish men, women and children were shot to death there. *United States v. Kungys*, 571 F. Supp. 1104, 1134 (D.N.J. 1983).

Because the district court refused to admit in evidence the deposition testimony identifying petitioner as a participant in the Kedainiai massacres (an evidentiary issue that the Third Circuit found unnecessary to reach),¹³

¹² As noted by the Third Circuit, the willfulness of petitioner's misrepresentations is not at issue. *United States v. Kungys*, 793 F.2d 516, 521 (3d Cir. 1986). Petitioner admitted at trial that he had deceived U.S. authorities as to his date and place of birth. *United States v. Kungys*, 571 F. Supp. 1104, 1134 (D.N.J. 1983). As to petitioner's misrepresentation of his wartime whereabouts, willfulness may fairly be presumed from petitioner's having continued this deception throughout the trial of the action. See *id.*

¹³ 793 F.2d at 520.

the court was unable to determine conclusively whether he had taken part in these killings. Importantly, however, the court held (1) that the government's charges of complicity in these atrocities "find strong support" in three of the depositions (in which the deponents were all self-confessed participants in the killing operation) (571 F. Supp. at 1119), (2) that had that testimony been admitted in evidence, it "would be strong evidence" that petitioner "was an active participant in the killing[s]" (*id.*), and (3) that the "falseness of defendant's [trial] testimony" denying his presence in Kedainiai "would tend to corroborate the evidence of his complicity in the killings" (*id.* at 1134). In addition, in its December 20, 1983 decision denying petitioner's motion for an award of legal fees and expenses, the court held that at the time the government filed suit to revoke petitioner's citizenship, it had "a reasonable basis for the facts alleged in the pleadings" and for believing that it could prove them by "clear, unequivocal and convincing" proof that "does not leave the issue in doubt." *United States v. Kungys*, 575 F. Supp. 1208, 1210 (D.N.J. 1983). In this second decision, the court further stated that had certain steps been taken to test the reliability of the testimony, the government "might have established" that petitioner took part in the mass killings at Kedainiai. *Id.* at 1211.

B. Had Petitioner's Willful Misrepresentations Been Discovered in 1947 or 1953, the Resulting Investigation Would Have Had an Even Greater Chance of Discovering, at a Minimum, the Same Strong Evidence Linking Petitioner to Mass Killings

The district court correctly observed that enormous difficulties are involved in proving details of events that took place in Europe during World War II, as "[s]ome witnesses have died, others are scattered throughout the world . . . , and surviving "[p]ertinent records and documents likewise are scattered" *Id.* at 1212. As noted, however, the court held that these nearly insurmountable obstacles notwithstanding, a U.S. government

investigation conducted some forty years after the war-time events in question had succeeded in adducing "strong evidence" of petitioner's complicity in Nazi atrocities, which evidence gave the government a "reasonable basis" for concluding that it could prove such complicity by "clear, unequivocal and convincing evidence," and that, had the depositions been admitted, the government might well have established petitioner's criminal conduct to the court's satisfaction.

Had petitioner's willful misrepresentations been discovered in 1947, when he applied for immigration, or in 1953, when he petitioned the U.S. District Court at Newark for admission to citizenship, there would certainly have been an investigation,¹⁴ one that, for the reasons noted above, would have had a far greater chance of discovering evidence and proving that petitioner took part in wartime atrocities than did the federal investigation which uncovered so much evidence several decades later.

C. Discovery of Strong Evidence of Petitioner's Complicity in Nazi Atrocities Would Plainly Have Been "Capable of Influencing" Official Action on Petitioner's Visa Application and Naturalization Petition, and Accordingly, the Misrepresentations that Prevented the Timely Discovery of Such Evidence are "Material" Under 8 U.S.C. 1451(a)

The question then is whether the fruits of that investigation would have been capable of influencing the decision made on petitioner's visa application or petition for naturalization. As is demonstrated below, the answer most assuredly is yes. An investigation conducted so soon after the war would have been even more likely to have found, at a minimum, the same "strong evidence" provid-

¹⁴ As the Third Circuit noted, a former vice-consul who served at the U.S. Consulate at Stuttgart at the time petitioner applied there for his visa and the naturalization examiner who actually handled petitioner's citizenship petition both gave un rebutted testimony that had petitioner's deception been discovered at either stage, an investigation would certainly have been commenced. 793 F.2d at 531, 533.

ing a "reasonable basis" for concluding that petitioner participated in Nazi atrocities, and hence that he was ineligible for entry into the United States (under federal regulations barring the entry of aliens "who had been guilty of, or who had advocated or acquiesced in, activities or conduct contrary to civilization and human decency on behalf of the Axis countries" during World War II)¹⁵ and ineligible for citizenship as well (under federal statutes prohibiting the admission to U.S. citizenship of persons who have entered the United States unlawfully and/or who lack the requisite good moral character).¹⁶ Moreover, as the Third Circuit noted, non-preference visas were to be issued only to "victim[s] of Nazi persecution." 793 F.2d at 530, 531. Accordingly, this "strong evidence" of involvement in Nazi atrocities would have provided an alternate "reasonable basis" for concluding that petitioner had failed to satisfy his burden of proving his eligibility to enter the United States.

Under the definition of "materiality" employed in all analogous areas of federal law—a definition which, as demonstrated above, is the one that should govern the application of *Chaunt* as well—the foregoing facts are plainly "material." A reasonable consular official or naturalization examiner—i.e., one who was making a good faith effort to enforce U.S. law—would surely have found them to be, at the very least, "important" and "capable of influencing" his decision. See *Kungys*, 571 F. Supp. at 1136 (information as to applicant's wartime residences and occupations "tended to indicate the applicant's relationship to the Nazi occupation forces" and hence was "[of] particular interest" to U.S. immigration authorities) (emphasis added). Indeed, as the district court held, had the eyewitness testimony been admitted

¹⁵ Act of May 23, 1918 (40 Stat. 559), as amended by the Act of June 21, 1941 (55 Stat. 252) and Presidential Proclamation No. 2523 of November 14, 1941 (55 Stat. 1696), 10 Fed. Reg. 8995, 8997, 9000 (1945); 8 C.F.R. 175.52(a), 175.53(j), 175.53(k) (1947a); 22 C.F.R. 58 (1947a).

¹⁶ 8 U.S.C. 1429, 1427(a).

in evidence, the one misrepresentation that petitioner continued at trial—his denial that he was present in Kedainiai at the time of the massacres—would have been of manifest importance to the court's *own* decision (on whether to order petitioner's denaturalization), for that misrepresentation would, in the court's words, "tend to corroborate the evidence of his complicity in the killings." *Id.* at 1134. *A fortiori*, the discovery of that misrepresentation 35 to 40 years ago would have been at least as important to U.S. authorities in deciding upon petitioner's visa application in 1947 and his petition for naturalization in 1953.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the decision of the Third Circuit below, and to resolve these issues in a way that makes it clear that a willfully misrepresented or concealed fact is "material" if disclosure of the true facts or discovery of the misrepresentation or concealment would have prompted an investigation possibly leading to the discovery of specific facts, which facts were capable of influencing the decision on the applicant's visa application or petition for naturalization.

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No. 86-228

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS,

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—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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THE BOSTON COLLEGE LAW SCHOOL HOLOCAUST/
HUMAN RIGHTS RESEARCH PROJECT, AMICI CURIAE, ON
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The Anti-Defamation League of B'nai B'rith, and the Boston College Law School Holocaust/Human Rights Research Project, pursuant to Rule 36.3, hereby move for leave to file the attached brief *amici curiae* supporting the respondent in *Kungys v. United States*, No. 86-228.

Consent to file the attached brief has been sought from the parties: while the government has consented, and the letter expressing such consent has been filed with the Clerk of the Court, petitioner, Juozas Kungys, has not. It is therefore necessary to request permission of this Court.

The background and concerns of the *amici* are hereby set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League of B'nai B'rith, and the Boston College Law School Holocaust/Human Rights Research Project are national organizations which have long sought justice for victims of the Holocaust—as well as a fair and just application of our nation's immigration laws. Each organization is able to bring to the issues raised on this appeal the perspective of organizations dedicated to ensuring our immigration laws are sensitive to this nation's long-standing commitment to providing asylum for those fleeing persecution—while ensuring that we not become a refuge for persecutors.

Questions Presented

1. Where the government has proven by clear and convincing evidence that the truth, if revealed, would have triggered an investigation possibly discovering facts warranting denial of citizenship, may a naturalization order be set aside under this Court's holding in *Chaunt v. United States*, 364 U.S. 350 (1960).
2. Whether the conceded, willful misrepresentations and concealments by petitioner about his date and place of birth, and his residence and occupation, during a time when massacres were committed where he was living, were "material" so as to warrant denaturalization under § 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

TABLE OF CONTENTS

	PAGE
MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, ET AL., FOR LEAVE TO FILE A BRIEF <i>AMICI CURIAE</i>	i
QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT OF THE FACTS	2
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. THE PROPER STANDARD FOR THE MATERI- ALITY OF MISREPRESENTATIONS AND CON- CEALMENTS UNDER THE SECOND PRONG OF <i>CHAUNT</i> AND 8 U.S.C. § 1451(a) IS THE "POSSIBLY" STANDARD	13
A. The Conflicting Standards Under <i>Chaunt</i>	14
B. The "Possibly" Standard Is The Proper <i>Chaunt</i> Standard	17
II. KUNGYS' MISREPRESENTATIONS WERE MA- TERIAL UNDER ANY INTERPRETATION OF <i>CHAUNT</i>	19
A. Kungys' Misrepresentations Were Willful	20
B. Kungys' Misrepresentations Are Material Be- cause The Truth Would Have Triggered An Investigation Possibly Resulting In Disqualifying Facts	21
1. Kungys' Misrepresentations Concerning His Date And Place Of Birth Are Material As Held By The Court Of Appeals	21

2. Kungys' Misrepresentations Concerning His Wartime Residence And Occupation Are Ma- terial And Provide An Additional Ground For Denaturalization	24
---	----

C. The Government Has Met Its Burden To Show Kungys' Willful Misrepresentations And Con- cealments Were Material	27
--	----

CONCLUSION	29
------------------	----

TABLE OF AUTHORITIES

CASES	PAGE
<i>Baumgartner v. United States</i> , 322 U.S. 665 (1944)	20
<i>Berenyi v. District Director, INS</i> , 385 U.S. 630 (1967) . . .	13, 16
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960)	<i>passim</i>
<i>Corrado v. United States</i> , 227 F.2d 780 (6th Cir. 1955) . . .	12, 15
<i>Fedorenko v. United States</i> , 597 F.2d 946 (5th Cir. 1979); <i>aff'd on other grounds</i> , 449 U.S. 490 (1981)	<i>passim</i>
<i>Handel v. Artukovic</i> , 601 F. Supp. 1421 (C.D. Ca. 1985) . . .	2
<i>Johanessen v. United States</i> , 225 U.S. 227 (1912)	12, 19
<i>Korematsu v. United States</i> , 584 F. Supp. 1406 (N.D. Ca. 1984)	21
<i>Maikovskis v. INS</i> , 773 F.2d 435 (2d Cir. 1985)	13, 16, 17
<i>The Nurenberg Trial</i> , 6 F.R.D. 69 (1946)	3
<i>People v. Kurt Christman</i> , L.G.E. Munich, F.R.G. (Dec. 19, 1980)	26
<i>People v. Viktors Arajs</i> , L.G.E. Hamburg, F.R.G. (Dec. 21, 1979)	26
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943)	13, 16
<i>United States v. Accardo</i> , 113 F. Supp. 783 (D.N.J. 1953) . .	12
<i>United States v. Ginsberg</i> , 243 U.S. 472 (1917)	12
<i>United States v. Kairys</i> , 782 F.2d 1374 (7th Cir. 1986) . . .	25
<i>United States v. Kowalchuk</i> , 773 F.2d 488 (3d Cir. 1985) (en banc), <i>cert. denied</i> , — U.S. —, 106 S. Ct. 1188 (1986)	25
<i>United States v. Koziy</i> , 728 F.2d 1314 (11th Cir.), <i>cert.</i> <i>denied</i> , 469 U.S. 835 (1984)	17, 25
<i>United States v. Linnas</i> , 527 F. Supp. 426 (E.D.N.Y. 1981)	25, 26
<i>United States v. Montalbano</i> , 236 F.2d 757 (3d Cir. 1956) . .	15

<i>United States v. Oddo</i> , 314 F.2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963)	15
<i>United States v. Osidach</i> , 513 F. Supp. 51 (E.D. Pa. 1981)	25, 26
<i>United States v. Palciauskas</i> , 734 F.2d 625 (11th Cir. 1984)	19, 24, 28
<i>United States v. Schuk</i> , 565 F. Supp. 613 (E.D. Pa. 1983)	25
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (10th Cir. 1983)	15
<i>United States v. Smith</i> , 62 F.2d 808 (7th Cir. 1933)	11
<i>United States v. Trucis</i> , 89 F.R.D. 671 (E.D. Pa. 1981) .	25, 26
<i>Petition of Yuska</i> , 128 Misc. 2d 98, 488 N.Y.S. 2d 609 (1985)	26

STATUTES

Immigration and Naturalization Act

8 U.S.C. §1101(f)(6)	16
8 U.S.C. §1451(a)	ii, 13, 15, 28
Act of September 26, 1961, 75 Stat. 650	15

LEGISLATIVE AND ADMINISTRATIVE MATERIAL

H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961)	16
22 C.F.R. §61.329 (Supp. 1946)	22, 27

RULES

Federal Rules of Civil Procedure, Rule 28(b)	26
--	----

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RIGHTS RESEARCH PROJECT, *AMICI CURIAE*, ON
BEHALF OF RESPONDENT**

INTERESTS OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. To advance these goals, the ADL seeks good will and mutual understanding among Americans of all creeds and races and combats racial and religious prejudice and the deprivation of civil liberties.

From the beginnings of the unprecedented genocide committed by the Nazis against the Jewish people and other groups, the League has opposed Nazism in all its forms and activities. Following World War II, the League has sought to expose the perpetrators of those crimes against humanity and bring them to justice.

In support of these principles of protecting human rights for all, without regard for race, creed or religion, and its goal of seeking justice for the heinous human rights violations committed during the Holocaust, the ADL has filed numerous *amicus* briefs. See, e.g., *Fedorenko v. United States*, 449 U.S. 390 (1981) (concerning misrepresentation standard applicable to Nazi war criminal failing to disclose participation in commission of atrocities at Treblinka Concentration Camp); *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Ca. 1985) (civil action against former Croatian Minister of Police for war crimes).

The Boston College Law School Holocaust/Human Rights Research Project was founded in 1984 to develop and encourage legal scholarship on Holocaust-related law. The Project's work is intended to illustrate the precedential value of such law for current human rights law and to define legal responses to persecution in the post-World War II era. In its capacity as the only organization in North America devoted to the study of Holocaust-related law, amongst its other activities, the Project has provided Congressional testimony and supported litigation through research.

The Anti-Defamation League and the Holocaust/Human Rights Research Project's interest in this case rests on their particular concerns with the application of immigration policy as intended by Congress; to ensure that this country remains a haven for the persecuted and remains beyond the reach of those who engage in acts of persecution.

The League and the HHRRP respectfully offers this Court its accumulated experience with the issues raised by this case.

STATEMENT OF THE FACTS

A. The "Final Solution" in Lithuania

Prior to June 1941, Lithuania was under the control of the Soviet Union. On June 22, 1941, Nazi Germany invaded the Soviet Union and Lithuania. A333, 340, 1502-504¹

1. Page citations to the Joint Appendix in the Supreme Court are preceded by the letters "JTX;" page citations to the Court of Appeals Appendix volumes are preceded by the letter "A;" page citations to the Court of Appeals Trial Exhibit volumes are preceded by the letter "X."

Immediately after this invasion, groups of armed, local men were formed throughout Lithuania to take control of the communities where they lived. A363, 393. Entering German troops were welcomed as liberators by many Lithuanians and succeeded in obtaining active local assistance. A1504.

All persons identified as communists and all Jewish men, women and children throughout the occupied territories were to be killed as a matter of Nazi policy. The killing of all Jews was termed "the final solution to the Jewish question." A195-6, 1504-508. The task of killing Jews in Lithuania was assigned to a special German mobile unit called *SS Einsatzgruppe A*, subdivided into groups called *SS Einsatzkommandos*. A357. Moving close to the frontlines, the *Einsatzkommandos* entered the newly-occupied areas, obtained the help of local Lithuanians, and speedily performed the grisly tasks of identifying, confining and killing their victims. Most of the killings were carried out in the towns and hamlets where the civilians resided. A340-42, 358-64, 374-81; X218, 230, 259, 270, 277. By December 1941, approximately 137,000 Jews had been killed by the *SS Einsatzkommandos* and their local collaborators. A1508; X247. See also *The Nuremberg Trial*, 6 F.R.D. 69, 128, 142 (1946).

B. Petitioner and the Kedainiai Killings

1. Petitioner's Background

Petitioner Juozas Kungys was born September 21, 1915 at Reistru Village, Silales County in the Taurage region of Lithuania. A806; X117, 125, 163, 477-99, 536. In 1938, Kungys entered military service, received infantry training, and was graduated from cadet school. X121-27. In 1939, having attained the rank of junior lieutenant, he left military service and began work with the Bank of Lithuania in Kedainiai. X128-163. He remained in that employment throughout both the Soviet occupation and the first few months of the Nazi occupation. In mid-October 1941, he moved 25 miles south to Kaunas, Lithuania's capital. X155, 167, 501; A1527-528.

While in Kedainiai, Kungys joined the Sauliai (the riflemen association) which, inter-alia, provided military training. He also practiced his shooting skills at the rifle range. X90-1. Throughout the period of his bank employment in Kedainiai, Kungys resided as

a boarder at 3 Radvilu Street, a house owned by the parents of his future wife. *Id.*; X167, 500, 1067-068. During his tenure at the bank, he came to know Juozas Kriunas, who was then chief accountant of a local cooperative known as Dirva. A1003-004; X568-69, 992-93. Kungys also became acquainted with another resident of the house, Jonas Dailide, who continued boarding there until the mid-nineteen fifties. X921, 1063-068. Both Dailide and Kriunas testified by videotaped deposition.

2. The Kedainiai Killings

In 1941, the town of Kedainiai had a population of well over 8,500, including some 2,500 Jewish men, women and children. A1510. The district of Kedainiai, comprised of some 16 villages, had a population of about 102,000. *Id.*; A313-14; Janson dep. 30-1; *see also* X633. Both before and during World War II, Kedainiai had fewer than 10 policemen.

Shortly after the Nazi invasion, local men in the Kedainiai district who had military experience or who were members of the riflemen association, the Sauliai, were grouped in civilian auxiliary detachments to assist the regular police. These men kept their usual employment during the day, but at night, wearing white arm bands for identification, patrolled streets and guarded bridges. A797-801, 1511; X569-72, 679-81, 696, 843-44, 882-83, 922-27, 944, 1128-31.

Soon after the German occupation began, Kedainiai's Jewish residents were ordered to wear a Star of David, were forbidden to use sidewalks and were forbidden to speak with non-Jews. They were later confined behind barbed wire in a small ghetto. A797-801; X575-77, 695-97, 843-44, 940-42, 1079-082, 1117-118. The civilian auxiliaries helped patrol the ghetto perimeter at night. A1511; X926-27, 942-43.

In July 1941, about 125 men and women, believed to be communists or former Soviet government officials were arrested and imprisoned in a barracks in Kedainiai. Armed members of the civilian detachments transported these men and women in groups from the barracks to a nearby forest, Babeniai, in trucks. Some members of the civilian detachments guarded the area, while other civilians and

German soldiers directed the prisoners into a large pit. There, the men and women were shot by the Germans. A1511; X922-38, 997-98, 1007. *See also* X233, 247, 574-74, 686-90.

Members of the local civilian auxiliaries also helped kill Kedainiai's Jewish residents. After the Jewish population had been assembled in the ghetto, they were marched to a horse breeding farm named Zirginas on the outskirts of town, where they were confined. X697-98, 844. On August 28, 1941, the civilian detachments, as well as certain groups of local workers, were ordered to assemble in Kedainiai together with the regular police and German soldiers. X568, 591, 756-57, 763-71, 845-49, 867, 880, 945-47, 990-1000. *See also* X1122-126. Some of the civilians were taken by trucks to a place near Zirginas, where a huge pit had been dug. Lime, beer and vodka were also brought to this place. X594-602, 768-78, 777-79. Other armed civilians stood guard at a perimeter 50 to 60 meters from the ditch to prevent escape and to block persons from entering the killing ground. X594-95, 620-21. *See also* X853, 951-62. Then, a special detachment of German soldiers arrived. A1511.

The Jews were taken in groups from the Zirginas barns to the ditch, a distance of about one kilometer. Germans and Lithuanian civilians directed the line of march and helped load those unable to walk into trucks bound for the pit. Once there, the victims were ordered to undress, forced into the pit and shot. A1512; X592-94, 598-99, 622, 782-86, 789-93, 803-04, 952-55, 982-83, 988-99, 1009.

Engines were kept running to muffle the victims' screams. X584, 602, 784, 861-67. The shootings continued into the evening, until all the Jews were killed. X600, 622, 963, 974. Nazi records recite the killing of 710 Jewish men, 767 Jewish women and 599 Jewish children in Kedainiai on August 28, 1941. X252; A1511-513.

3. Evidence Presented of Kungys' Role in Persecution and Killings

About 100 men in Kedainiai participated in the civilian auxiliary groups, according to the testimony of witnesses in Lithuania and the United States. X569-72, 679-81, 697, 834-44, 882-83, 925-27,

X1128-131; A797-801. Many of the auxiliaries had been in the military, had received military training, or had been members of the riflemen association, the Sauliai. A1511. Kungys, a former army junior lieutenant with infantry training, admitted that he had been a member of the Sauliai, in Kedainiai, and practiced his rifle shooting there. X90-1; A843-45.

Two witnesses testified that Kungys acted as the leader of one detachment numbering 20 to 30 men. One of the witnesses was Kungys' former roommate, Dailide, the other witness was the former chief accountant of a local cooperative, Kriunas. X569-72, 580, 922-27. *See also* X793, 810-11, 862-63, 994-95, 1014-017.

Lists of the auxiliary detachment members were kept at the headquarters of the German commandant, which was next to the Kungys' residence. A998-99; X681, 924, 1082-083. Kungys kept a list of the members of his group at his desk in the commandant's office, across the street from Kungys' residence. X633, 645-46. *See also* X503.

When Kungys was interviewed by government attorneys in March 1981, he was read a list of 44 names taken from affidavits of persons who allegedly served with Kungys or other detachments during the Kedainiai killings; at that time he was not told the source of the names. Kungys swore he recognized only two of the 44 names. JTX 117-128.

Soon after the complaint was filed, Kungys wrote a letter to a prospective defense witness stating that:

[T]hey [government counsel] presented before me the longest list of Riflemen's Association members from the commandant's office and kept asking me whom I knew.

I don't know why our people are so unwilling to help one another. Just look at how the descendants of Abraham are doing it.

JTX 139.

He denied under oath any knowledge of the Kedainiai killings and any knowledge of the names read to him by the government. Kungys admitted to a prospective defense witness that he had recog-

nized many of the names as former riflemen association members, and that he knew that the "commandant's office" kept such a list. X633, 645.-At the trial, Kungys admitted the authenticity of the letter, A954-55, and he also admitted that the riflemen association members referred to in his letter were the people about whom he was questioned during the March 1981 interview. A1007-016.

Witnesses Kriunas and Dailide described Kungys' participation in the July executions at Babenai forest. Kungys was seen at the barracks where the civilian auxiliaries had assembled. Later, he was seen riding in the cab of a truck arriving at Babenai with the condemned prisoners. X932-37. One of Kungys' auxiliaries testified that Kungys later admitted participating in the killings. X574-75.

These witnesses also described Kungys' involvement in the persecution and killing of Kedainiai's Jewish residents. They stated that Kungys ordered his auxiliaries to help force the Jews into the ghetto and to confiscate their property. X583-85. He also supervised his men on guard at the ghetto. X577-79, 926-27, 942-43. Kungys and his men also helped guard the ghetto residents en route to the horse farm just prior to execution. X582-83.

On the day of the execution Kungys ordered his men, armed with rifles, to assemble. X588-90, 947-48. He ordered some of his men to take the Jews from the horse farm barns to the execution pit. X588. He ordered others to stand guard near the pit and to place old and disabled victims into trucks. X948-50, 963.

At both the barracks and the pit, Kungys gave commands, and interpreted and transmitted German orders to members of the Lithuanian civilian auxiliaries. X588-99, 947-51, 1001-002. *See also* A1057, X536. He led his unit in moving Jewish women and children from the barns to the ditch where he ordered victims to undress. X591-93. Women and their children were forced into the pit whereupon, Kungys, and others, shot them. *Id.*; *see also* X594, 618, 865-65, 784-87, 962-63. Kungys and his men also brought a group of Jewish men to the execution pit. Kungys ordered them to undress and then participated in shooting them. X597-98.

C. Kungys' Post-Kedainiai Activities

According to information Kungys provided to German officials, from 1941 onward he was the manager of an industrial concern in Kaunas. JTX 65; X495, 524, 543, 547. *See also* X977, 1069-071. In August 1944, as the Red Army advanced, Kungys and his wife fled and eventually settled in the Tuebingen region of Nazi Germany. *Id.* X524; A2021. Kungys applied for and received permission from Nazi authorities in Tuebingen to reside in Nazi Germany without special restrictions. JTX 59. His wife applied for permission from Nazi authorities to practice dentistry. X1279; A1276-80.

Kungys registered with local authorities in Tuebingen. Nearly all the Tuebingen registry records show his true date and place of birth. *See* JTX60, 67-68; X475-99. In applying for matriculation at Tuebingen University in 1945, Kungys submitted a 1938 seminary record showing his true date and place of birth. JTX 61; X536; A1530.

D. Kungys' Concealments to Obtain a Visa

Kungys applied for an immigration visa at Stuttgart, Germany in January 1947. To obtain his visa, he submitted certain applications together with supporting documents, such as birth and police records. The district court found, and Kungys conceded, that in his visa application he misrepresented and concealed his date and place of birth, his places of residence during the period 1940-1942, and his wartime occupation. The court also found that to support his application, Kungys submitted four documents (JTX 28, 29, 37, 38) each of which contained false information regarding his date and place of birth. One such document, bearing the seal "Nazi victims," alleged Kungys had been persecuted by the Gestapo. JTX29; A1530-531. Kungys had previously given Nazi authorities in another part of Germany true information, and he possessed or could have obtained supporting documents with the true information, *e.g.*, his Tuebingen registry and seminary records. Kungys gave false information and documents to American officials. *Id.*

An applicant who gave false documents or documents with false information would not have met the requirements for obtaining a visa. JTX 199-203. Seymour Maxwell Finger, a professor and

former United States Ambassador to the United Nations who had served as the vice-consul in Stuttgart at the pertinent time, testified, without contradiction, that a visa would routinely be denied to any applicant who lied to the vice-consul concerning any one of the facts petitioner misrepresented. *Id.*

Ambassador Finger also testified, without rebuttal, that any factual inconsistencies between information contained in visa application forms and supporting documents always called into question the authenticity of the supporting documents. Upon discovering a discrepancy, an investigation would have been undertaken, including a check of available records in each of the applicant's prior places of residence, especially those readily available in Germany. If the investigation results showed that the applicant had misstated the facts to the vice-consul, the visa application would be denied. JTX 198-200.

E. Kungys' Concealments to Obtain Citizenship

Kungys executed an Application to file a Petition for Naturalization, an attached Statement of Facts for Preparation of Petition (Form N-400), X28, and a Petition for Naturalization (Form N-405), X33 in October 1953. At his naturalization examination petitioner reviewed the Form N-400, X28, and swore to the truth of the contents; he also executed under oath a Petition for Naturalization. In each of these documents Kungys swore to a false date and place of birth. In addition, Kungys falsely swore in form N-400 that he had not previously given false testimony to obtain benefits under the immigration and naturalization laws. A1532; X1173-176, 1183-86.

Julius Goldberg, a retired immigration judge and the naturalization examiner who processed Kungys' application, testified, without rebuttal, that applicants who gave false testimony to obtain benefits under the immigration and naturalization laws were denied naturalization. X1173-176, 1183-86, 1200-203, 1223; A521-34. Judge Goldberg also testified that when an applicant gave information in his naturalization papers that was inconsistent with data contained in his visa papers, the naturalization application either would be denied outright or, at a minimum, suspended and referred to the Immigration and Naturalization Service for investigation. *Id.*; 1200-202, 1223.

F. Kungys' Post-Naturalization Concealments

Kungys lied under oath that he did not reside in Kedainiai during July and August 1941, when questioned by the government in 1975 and 1981, JTX 73, 85-86, and throughout the litigation below. Similarly, in 1975 and 1981 and throughout the litigation below, he denied all knowledge of the Kedainiai killings, in which about one-fourth of Kedainiai's residents perished. Kungys lied under oath to the government in 1975 as to his date and place of birth. In 1981, he lied initially under oath concerning his date and place of birth. It was only after realizing he had identified related holographic documents with truthful information did he change his testimony:

Kungys explained he had lied about his date and place of birth only "to escape the Germans . . . strictly because of my activities against the Germans."

JTX 131-137.

The District Court's Opinion

The district court found that Kungys gave false testimony to United States immigration officials regarding his date and place of birth, his wartime residence and his wartime occupation. A1531, 1533. To support his visa application, Kungys submitted documents with false information relating to his personal background. *Id.* The court rejected Kungys' assertion that he was employed at a printing house in Kaunas during the time of the extermination of Jewish residents. The court found to the contrary, that petitioner had resided in Kedainiai throughout the period of the killings. A1528.²

The court further found that Kungys, falsely stated, under oath, his date and place of birth to a naturalization examiner at the time he petitioned for citizenship, and that Kungys lied in the naturalization application when he claimed that he had not previously given false testimony to obtain benefits under the immigration and naturalization laws. A1532-533. Nevertheless, the court held that peti-

2. The court was unpersuaded by an employment document, X36, Kungys first gave I.N.S. investigators in 1977 to support this alibi. A885-89.

tioner's misrepresentations were not "material," and therefore, that denaturalization was unwarranted.³ A1527, 1538.

The court found that the videotaped deposition testimony of witnesses in Lithuania provided a strong factual predicate for granting judgment for the government. The court stated that defendant's false testimony that he left Kedainiai before the killings, would tend to corroborate the evidence of his complicity in the killings. However, the court refused to admit into evidence against petitioner any inculpatory testimony by these witnesses respecting Kungys' actual role in the persecution and murder. The court admitted and fully credited these witnesses' detailed descriptions of the killings in Kedainiai for all other purposes. A1511, 1513, 1520, 1526.

The Court of Appeals' Opinion

The court of appeals reversed the district court. It held that the misrepresentations about date and place of birth in Kungys' visa application were material and provide a basis for revocation of citizenship. The court held that truthful statements by Kungys would have led to an investigation, which in all probability would have revealed the disqualifying fact that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa.

The court elected not to reach the evidentiary issue of the admissibility of the videotaped testimony, finding the presence of sufficient material evidence in the trial record concerning Kungys' misrepresentations of date and place of birth to resolve the denaturalization issue.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Well imbedded in the fabric of United States immigration law is the premise that the acquisition of American citizenship is not a natural right held by an alien, but a privilege enjoyed by sufferance of the United States. See *United States v. Smith*, 62 F.2d 808, 810

3. The court also found an insufficiency of evidence to support petitioner's claim that he had served in the underground during the war, which purportedly led him to conceal his true date and place of birth. A1528-529. See also A1409-411.

(7th Cir. 1933), citing *Johanessen v. United States*, 225 U.S. 227; 240 (1912). It is a conditional privilege granted only after strict compliance with congressionally defined prerequisites.

As this Court has explained:

No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . .

Fedorenko v. United States, 449 U.S. 490, 507 (1981), quoting *United States v. Ginsberg*, 243 U.S. 472, 474-475 (1917).

One of the conditions of the acquisition of citizenship is that "our Government is afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States." *Corrado v. United States*, 227 F.2d 780, 784 (6th Cir. 1955); see *United States v. Accardo*, 113 F. Supp. 783, 787 (1953). "Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discovered. Failure to give frank, honest and unequivocal answers to the court when one seeks naturalization is a serious matter." *Chaunt v. United States*, 364 U.S. 350, 353 (1960). Such failure to be truthful is a serious matter because it deprives our government of its right to pursue those inquiries necessary to make a fully informed judgment about an applicant for citizenship.

Juozas Kungys lied to our government both at the visa application and at the naturalization proceeding. Kungys failed to give a "full and truthful response" to the relevant questions posed at each examination. As a result of his deception concerning such fundamental facts as his wartime residence and occupations, as well as key facts bearing on his identity including his birthdate and birthplace, the government's self-protective right to investigate aliens seeking citizenship was undermined. That the government's rightful opportunity to investigate Kungys at the time of his application for a visa was thwarted is especially troubling, considering Kungys' presence in Kedainai, Lithuania during the massacre of over 2,000 unarmed Jewish men, women and children in the summer of 1941.

Kungys told a lie at the very times the burden was on him to convince the government he was eligible to be a United States citizen. Thus in 1947 and 1954, through concealment and misrepresentation, Kungys evaded the heavy burden traditionally imposed on those seeking a visa and naturalization. See *Berenyi v. District Director, INS*, 385 U.S. 630 (1967). Once a citizen, the burden shifted to the government to prove its case for denaturalization by "clear, unequivocal and convincing evidence." *Schneiderman v. United States*, 320 U.S. 118, 125 (1943). In 1987, Kungys seeks to rely upon this governmental burden to shield him from loss of citizenship. It would be ironic if through deception, Kungys were able to foreclose government inquiry, shift the burden of proof, and immunize himself from further investigations. Such a result is indeed an incentive to lie. See *Maikovskis v. I.N.S.*, 773 F.2d 435, 442 (2d Cir. 1985).

ARGUMENT

I. THE PROPER STANDARD FOR THE MATERIALITY OF MISREPRESENTATIONS AND CONCEALMENTS UNDER THE SECOND PRONG OF *CHAUNT* AND 8 U.S.C. § 1451(a) IS THE "POSSIBLY" STANDARD

Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), provides that in a denaturalization proceeding, the government must prove that the order granting citizenship was "illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation." *Id.*

Kungys would rely on the finding of the district court below that his misrepresentations and concealments, though willful, were not "material" under *Chaunt v. United States*, and therefore no ground for denaturalization. This, *amici* submit, was plain error and properly reversed by the court of appeals, holding Kungys' misrepresentations to be material under *Chaunt*.

In *Chaunt v. United States*, 364 U.S. at 350, this Court examined certain concealments made by the defendant in connection with his petition for naturalization. The concealments included the fact that *Chaunt* had been arrested for speechmaking and handbill distributing activities and a breach of the peace. In deciding that *Chaunt's* failure to disclose his arrests was not material, the Court articulated

a two-part materiality test, either prong of which, if demonstrated by the requisite burden of proof could serve as the basis for revocation of citizenship:

(1) that facts were suppressed which, if known, would have warranted the denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355.

Significantly, the Court focused upon the "totality of the circumstances" in assessing materiality:

The totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence. Had they involved moral turpitude or acts directed at the Government, had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented. On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of 'clear, unequivocal, and convincing' evidence that naturalization was illegally procured within the meaning of § 340(a) of the Immigration and Nationality Act.

Id. at 354.

In applying a "totality of the circumstances" analysis, the *Chaunt* Court examined the substantive nature of the crimes for which the defendant was arrested. The Court noted that the offenses charged involved no moral turpitude nor did they even peripherally touch types of activity which might disqualify one from citizenship. *Id.* Essentially the Court found *Chaunt's* concealment of his arrests immaterial because even when disclosed the acts charged "were not reflections on the character of the man seeking citizenship." *Id.* at 353.

A. The Conflicting Standards Under *Chaunt*

Since the announcement in *Chaunt* of the "two prong" test for materiality, three interpretations of the second prong have emerged. The first interpretation, advocated by Kungys in the case at bar, draws no difference between the two prongs of the *Chaunt* materi-

ality test. It is the so-called "certainty" test and it maintains that under either prong the government must prove the undisclosed information "would" have led to the discovery of facts warranting denial of a visa. See *Fedorenko v. United States*, 449 U.S. at 518-26 (1981) (Blackmun, J., concurring); *United States v. Sheshtawy*, 714 F.2d 1038, 1040-41 (10th Cir. 1983).

The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity.

United States v. Montalbano, 236 F.2d 757, 759 (3d Cir. 1956). Accord, *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.), cert. denied, 375 U.S. 833 (1963); *Corrado v. United States*, 227 F.2d 780 (6th Cir. 1955).

This view of the *Chaunt* materiality test renders the second prong of *Chaunt* a meaningless reiteration of the first. This interpretation, advocated by petitioner, seeks to overrule this Court's opinion in *Chaunt* by collapsing the two-tiered materiality test into one. Additionally, it frustrates Congress' intent in creating two independent grounds for denaturalization, illegal procurement and misrepresentation, see 1961 amendment to the Immigration and Nationality Act of 1952.⁴ Requiring that the government prove

4. Pub. L. 87-301 §18, 75 Stat. 650, 656, 87th Cong. 1st Sess. (1961). Prior to passage of this amendment, the only basis for denaturalization under 8 U.S.C. §1451(a) was proof of concealment of material facts and willful misrepresentation. Congress decided to restore illegal procurement to the denaturalization statute in order to have two separate grounds for denaturalization. The Report of the House of Representatives leading to the new legislation leaves no doubt as to Congress' intent:

Naturalization is illegally procured if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted. In other words, naturalization has been illegally procured if jurisdictional factors are not present at the time the citizenship is granted. *United States v. Ginsberg*, 243 U.S. 472.

Notwithstanding that the law is, and has been, that "A person may be naturalized as a citizen of the United States in the manner

the actual existence of disqualifying facts effectively transforms the misrepresentation offense, *see* 8 U.S.C. §1451(a), into a form of the illegal procurement offense. This reading of the *Chaunt* two-prong test strips the misrepresentation provision of any independent meaning. *See Fedorenko*, 449 U.S. at 745.

Moreover, the certainty test sought by *Kungys* cannot be justified by policy considerations. To the contrary, requiring the government to prove "ultimate facts" at the time it discovers the applicant's deception encourages "the alien to conceal material information in his visa application documents and reward[s] him for the initial success of his nondisclosure." *Maikovskis v. I.N.S.*, 773 F.2d at 442. In lying about his background, an applicant for citizenship thereby prevents the government from investigating his fitness precisely when he has the burden of proving eligibility. *See Berenyi v. District Director, INS*, 385 U.S. 630, 636-37 (1967). If his deception is later discovered, this approach requires the government to carry out three difficult tasks: conduct an investigation into the past, discover ultimate facts warranting disqualification and prove those facts in court by clear and convincing evidence. *United States v. Fedorenko*, 597 E.2d 946, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981). *See Schneiderman v. United States*, 320 U.S. 118, 123 (1943). As the Fifth Circuit in *Fedorenko* concluded, "if that were the law, an applicant with something to hide

and under the conditions prescribed in this title *and not otherwise*" (sec. 301(d), Nationality Act of 1940, sec. 310(d) Immigration and Nationality Act . . .)[.] section 340 makes no provision for cancellation of citizenship where the conditions prescribed by Congress did not in fact exist—unless misrepresentation, etc. is involved.

The congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist. . . . [W]hile section 101(f) of the Immigration and Nationality Act spells out in detail the type of conduct which precludes an alien from establishing good moral character (thus barring him from eligibility for naturalization), the principle that willful misrepresentation and so forth must be established renders that section of the law inoperative, notwithstanding its clear and unmistakable purpose and intent.

H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961).

would have everything to gain and nothing to lose by lying under oath to the INS." 597 F.2d at 951. In penalizing the government for this foreclosure of inquiry, the certainty test should be disregarded.

Another interpretation of the second prong of the *Chaunt* materiality standard is the "probability" test. This test holds that "the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa." *Maikovskis v. I.N.S.*, 773 F.2d at 442. It was applied by the Third Circuit in this case.

B. The "Possibly" Standard Is The Proper *Chaunt* Standard

The proper interpretation of the second prong of the *Chaunt* materiality test is the "possibly" or "might have" standard. This standard provides that the government must prove that an investigation prompted by a truthful answer "might have led to the discovery of facts justifying denial of citizenship." *Fedorenko*, 449 U.S. at 528 (White, J., dissenting). See, e.g., *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984); *Fedorenko*, 597 F.2d 946.

The "possibly" standard is sensitive to the heavy burden placed upon the government in denaturalization cases in that it does not compel the government to conclusively prove the facts justifying denial of citizenship. It accounts for the difficulties that arise when many years have passed between the time the information was concealed by the applicant and the time the concealment is discovered. See *Fedorenko*, 449 U.S. at 527-528 (White, J., dissenting).

The problem is twofold. Under the alternate interpretations of *Chaunt*, if the government must prove facts justifying denial of citizenship it would have to prove the facts that existed many years prior to the time of the citizenship application. See, e.g., *Chaunt v. United States*, 364 U.S. at 355. Moreover, "the government's ability to investigate with vigor may be affected adversely by its inability to discover that certain facts have been suppressed." *Fedorenko*, 449 U.S. at 524.

In the case of Juozas Kungys, given the totality of the circumstances, the standard that ought govern his denaturalization determination envisions an investigation possibly leading to disqualifying facts. First, as in many cases concerning war-crimes, much time has passed since the crucial events in question. In 1947, when Kungys applied for his visa many of the facts at issue in this case were more easily verifiable. This was recognized below by both the trial and appeals courts. 571 F. Supp. at 1131; 793 F.2d at 527. That the government today must surmount a forty year time gap is the direct result of Kungys' concealments and misrepresentations concerning his identity at the visa and naturalization stages. The uncontroverted testimony of both Vice-Consul Seymour Finger and Immigration Judge Julius Goldberg establish that had Kungys told the truth regarding his birthdate and birthplace at either the visa or naturalization stages, discrepancies between this truthful statement and his falsified supporting documents would have triggered an investigation. 793 F.2d at 531, 533. This investigation was foreclosed by Kungys' misrepresentations.

Second, the court should consider as part of the totality of the circumstances the number and nature of Kungys' lies. Kungys lied to United States officials about his birthdate, his birthplace, his wartime residence and his wartime occupations; and he obtained documents to support these lies. Four separate lies operated to mask his identity at two crucial points: the visa application stage and the naturalization proceeding. Both opportunities for government investigation were thwarted by Kungys' concededly willful misrepresentations and concealments. See 793 F.2d at 521. The condition precedent to the acquisition of United States citizenship—full and frank disclosure, *Chaunt*, 364 U.S. at 352, was not satisfied by Kungys.

Moreover, the nature and implications of these lies compounds the seriousness of Kungys' misrepresentations. In the very place where Kungys resided during the months of July and August 1941, over 2,000 unarmed men, women and children were exterminated by the Nazi army. Kungys lied about his residence in Kedainiai, Lithuania. This lie deprived the government of its right to inquire into an area bearing directly upon Kungys' moral character and fitness for citizenship. It cannot be said of this circumstance what

was true of the facts in *Chaunt*. Residence in Kedainiai, Lithuania during the summer of 1941 directly bears on the likelihood of Kungys' involvement in the 1941 massacres and this constitutes the "typ[e] of activity which might disqualify one from citizenship . . ." *Chaunt*, 364 U.S. at 354.

Forty years after the fact, the government is now burdened with establishing the materiality of Kungys' misrepresentations and concealments. Forty years ago, without any excuse or explanation, Kungys cut off that line of inquiry. Kungys cannot now claim the protection of a "certainty" test for materiality. See *United States v. Palciauskas*, 734 F.2d 625, 628 (11th Cir. 1984).⁵ The proper standard for the case at bar is whether the truth would have triggered an investigation which might have led to the discovery of facts warranting denial of citizenship.

II. KUNGYS' MISREPRESENTATIONS WERE MATERIAL UNDER ANY INTERPRETATION OF *CHAUNT*

Application of the "might have" materiality standard to the case at bar entails a detailed consideration of the facts concerning Kungys' misrepresentations. That two lower courts have reviewed the factual record in this case presents no obstacle to this Court conducting its own *de novo* review. "In reviewing denaturalization

5. Denaturalization is essentially a suit in equity. *Johanessen*, 225 U.S. at 239. Therefore the Court's construction of materiality should not—as petitioner argues—ignore equity's demand of "clean hands." Here, Kungys has at all relevant times consistently engaged in a pattern of ever-shifting lies under oath to the State Department, the naturalization examiner, I.N.S. investigators, Justice Department attorneys and even the trial court. Kungys has in no believable way explained or excused his repeated violations of oath. Rather, in each case, Kungys engaged in falsification until, when confronted with irrefutable evidence he was lying, Kungys shifted his position yet again. The sole function of petitioner's materiality standard is to insulate him from the proper consequences of his repeated perjuries by a *de facto* statute of limitations. Plainly, Congress has never adopted a denaturalization statute of limitations, nor should this Court judicially create one by adopting petitioner's arguments and, thereby, sanctioning his repeated perjuries directed solely at United States officials, and solely to remove him from the place where over one fourth of Kedainiai's men, women and children were massacred.

cases, we have carefully examined the record ourselves." *Fedorenko*, 449 U.S. at 506. This Court stated in *Chaunt*:

The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here, for we deal with "judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship."

364 U.S. at 353, quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

In assessing the materiality of Kungys' misrepresentations, the Third Circuit employed the "probability" test stating "that where the government is able to prove that such investigations probably would have led to the discovery of disqualifying facts, then the materiality test under the second prong of *Chaunt* is satisfied." 793 F.2d at 527. However, the circuit expressly left unresolved the issue of which standard satisfied the materiality test under *Chaunt*. In the case at bar, where the "probability" test was satisfied, *a fortiori*, the "might have" standard is also met.

A. Kungys' Misrepresentations Were Willful

Kungys' misrepresentations and concealments, like his false testimony to the government and to the trial court, are conceded and deliberate, as found by the district court, 571 F. Supp at 1140, and as affirmed by the Third Circuit, 793 F.2d at 521. Though today petitioner disingenuously portrays them as errors and misstatements, *see, e.g.*, petitioner's brief at 13, 40; they were not errors. They were deliberate lies calculated to mislead the State Department in 1941, the naturalization examiner in 1954, I.N.S. investigators in 1975, Department of Justice attorneys in 1981, and the trial court and the court of appeals.

The issue therefore for this Court's review is the materiality of those misrepresentations.

B. Kungys' Misrepresentations Are Material Because The Truth Would Have Triggered An Investigation Possibly Resulting In Disqualifying Facts

1. Kungys' Misrepresentations Concerning His Date And Place Of Birth Are Material As Held By The Court Of Appeals

In this case, un rebutted vice-consul testimony concerning prevailing practice, together with applicable regulations, demonstrate that an investigation would have resulted in this case. At both the visa application stage and the naturalization proceeding, Kungys lied about his birthdate and birthplace. Had Kungys told the truth at either stage, the Third Circuit held, discrepancies between such truthful statements and the falsified supporting documentation submitted by Kungys would have triggered an investigation. This investigation in turn might have resulted in the denial of either his nonpreference quota immigration visa or his naturalization petition. See 793 F.2d at 530.

Petitioner seeks to distinguish between the likelihood of an investigation following disclosure of the truth, and the likelihood of an investigation arising from discrepancies in petitioner's application. See petitioner's brief at 13-14. Yet, the un rebutted testimony in the trial court concerned the likelihood of investigation arising from discrepancies between truthful statements and falsified documents in petitioner's application. Such discrepancies, without proof of the truth, have been held to show fraud. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D.Ca. 1984).

Ambassador Seymour Finger, who served as a vice-consul to the American Consulate in Stuttgart, Germany, when Kungys applied for his visa, testified at the trial below. Processing visa applications was among the duties required of vice-consuls. Although Ambassador Finger did not process Kungys' application, he testified as to the uniform standards in use at that time.

In evaluating the uncontroverted testimony of officials such as Ambassador Finger, this Court has noted that the un rebutted testimony of an official who interpreted and administered the immigration law during the applicable period may not be ignored. See *Fedorenko*, 449 U.S. at 511.

Ambassador Finger testified that at the time Kungys applied for his visa in Germany there were only two types of quota immigration visas being issued: preference and nonpreference. Kungys received a nonpreference visa, a type issued as a matter of policy, only to individuals without close relatives in the United States but who were victims of Nazi persecution. 793 F.2d at 530.

Significantly, Ambassador Finger gave un rebutted testimony that if discrepancies existed between supporting documents and the visa applications, the supporting documents would be "called into question" and there "certainly would have been an investigation." 793 F.2d at 531.

That an investigation would have ensued is further supported by the regulations in effect at that time. One such regulation, supporting Ambassador Finger's testimony, states:

If a consular officer has reason to doubt the authenticity of a document submitted to him, he should take appropriate steps to determine whether such documents may be accepted as genuine and properly issued.

22 C.F.R. § 61.329 (Supp. 1946).

Ambassador Finger's testimony showed that by following standard investigatory methods an investigation would have revealed that Kungys lived in Germany without harrassment and "received a residence permit without special conditions. . ." 793 F.2d at 531. Based upon this testimony the Third Circuit concluded "this information would tend to discredit defendant's claim that he was persecuted by Nazi Germany." *id.*, and therefore was not entitled to the nonpreference visa he received. Thus, truthful statements by Kungys would have led to an investigation which might have revealed the disqualifying fact that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa.

In applying for his visa, Kungys submitted a certificate from the Lithuania Ex-political Prisoners Central Committee ("Central Committee") which specifically stated that he was "persecuted by the Gestapo." 793 F.2d at 531. Moreover, Finger testified that in considering visa applications the consulate would rely upon expatriate groups such as the Central Committee to screen applicants and to determine eligibility requirements, namely, whether the applicant was a victim of Nazi persecution.

Though Kungys now would challenge this policy requirement, see petitioner's brief at 32, it must be remembered that it was petitioner who claimed to be "persecuted by the Gestapo" and who relied on the Central Committee Certificate to support this claim.⁶ Indeed, the Central Committee's seal contains the words "Nazi Victims."⁷ Kungys is estopped from now contesting a requirement which he made material and used to his benefit in obtaining a visa in 1947. Materiality must be determined on the basis of what Kungys told American officials in 1947—not on what he now says he might have said, but failed to say. Kungys stands logic on its head by arguing that the Court should ignore his claim to have been a Nazi victim. It was precisely this claim that Kungys asserted as the principal basis for his visa application and, until recently abandoned by him, was Kungys' excuse for repeated lying to United States officials.

Furthermore, at the naturalization proceeding petitioner's full disclosure also would have resulted in an investigation possibly leading to the discovery of facts disqualifying citizenship. Judge Goldberg examined Kungys at the naturalization stage and waived the field investigation. Yet, Judge Goldberg's un rebutted testimony indicated that had he been aware that Kungys lied to obtain his visa, misrepresented his date of birth, place of birth, as well as his war-time residence and occupation, and that Kungys swore to these falsehoods in his naturalization petition, he would have been re-

6. Kungys cites purportedly contrary immigration policies announced by President Truman to undermine the validity of the Nazi-persecutee requirement. Yet, these policies were considered and rejected by the Third Circuit and its reasoning should be affirmed by this Court. The Circuit stated:

We note that those presidential statements speak only in general terms concerning the need to resettle displaced persons and particularly orphaned children. The papers do not address the eligibility requirements of those seeking quota visas in Germany in 1947, and in no way do they contradict Ambassador Finger's testimony as to procedures in the Stuttgart Consulate.

793 F.2d at 532.

7. Those words were omitted from the seal prepared by petitioner in the Joint Appendix. JTX 29. The complete correct seal is reproduced at X9.

quired to direct a field investigation or simply recommend against naturalization. 793 F.2d at 533.

Yet in 1954 Judge Goldberg was aware of none of these facts. The truth was concealed, the investigation waived, and Kungys naturalized. Had Kungys told the truth at either the visa or the naturalization stage, the unrefuted testimony of Ambassador Finger and Judge Goldberg make it eminently clear that an investigation would have occurred which might have led to the discovery of facts warranting denial of citizenship. Thus, Kungys' misrepresentations were material under the second prong of the *Chaunt* test and as such warrant a setting aside of the denaturalization order.

2. Kungys' Misrepresentations Concerning His Wartime Residence And Occupation Are Material And Provide An Additional Ground For Denaturalization

More than forty-five years after the extermination of over 2,000 unarmed Jewish men, women, and children in a forest in Kedainiai, Lithuania, this Court need not determine the extent to which Kungys participated in these killings. It is a question that should have been answered by those American officials specifically appointed to review the eligibility of aliens seeking citizenship at a time when the facts had not yet been blurred by the passage of four decades. See *United States v. Palciauskas*, 734 F. 2d 625, 628 (11th Cir. 1984).

Nevertheless, several crucial facts have been established by the district and circuit courts. It is within the context of the following facts that the evidence against Kungys should be considered.

The district court recognized:

Of particular interest in the case of Eastern Europeans was the applicant's residences and occupations during the 1939-1945 period, since that information tended to indicate the applicant's relationship to the Nazi occupation force.

571 F. Supp. at 1136.

Juozas Kungys lived in Kedainiai in July and August of 1941. *Id.* at 1133. During those two months nearly 3,000 Jews were killed. *Id.* at 1118. It is uncontroverted that the Germans used local civilians to carry out their mass exterminations in Kedainiai. *Id.* at 1113. M-

itary training was the main requirement the Germans had in organizing their auxiliary groups. Kungys not only served in the army prior to the summer of 1941; he attended Cadet School. *Id.* at 1133. Furthermore, he was a member of the local "Riflemen" or "Sauliai." *Id.* Members of the Sauliai aided the Germans in their mass killings in July and August of 1941. *Id.* at 1117.

That Kungys lied about his presence in Kedainiai during the summer of 1941 tends to support the evidence of his complicity in the killings. Three witnesses testified at the trial that Kungys participated in aiding the Germans in the Kedainiai massacres. All three witnesses stated that they remembered Kungys as one of the heads or assistant heads of one of the auxiliary detachments working with the Germans. *Id.* at 1120-1121. The district court ruled that this testimony was unreliable and could only be admitted to establish the occurrence of the killings in Kedainiai. *Id.* at 1132.

The district court reasoned that because the testimony of the Soviet witnesses could not be admitted to prove Kungys' participation in the massacres, Kungys' misrepresentation about his wartime residence "bears primarily upon his credibility generally." *Id.* at 1134.⁸ In ruling that Kungys' misrepresentations were not

8. There is no support for the district court's automatic exclusion of evidence on the basis of its country of origin—in the absence of congressional or executive branch guidance. Even the district court recognized the utter absence of any showing of fraud or coercion in any case brought by our government relying on Soviet source evidence.

No defense evidence established that any document supplied by the Soviet Union in any denaturalization case was false or that any witness whose testimony was taken in the Soviet Union was subjected to improper pressure or other influences.

571 F. Supp. at 1126.

Soviet source evidence has been admitted into evidence routinely in denaturalization cases as recognized by the court of appeals, 793 F.2d at 520. *See, e.g., United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986) (Soviet-source depositions used); *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, — U.S. — (1986) (Soviet-source depositions used); *United States v. Schuk*, 565 F. Supp. 613, 615 (E.D.Pa. 1983); *United States v. Koziy*, 540 F.Supp. 25 (S.D.Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir. 1984), *cert. denied*, 469 U.S. 835 (1984)

material, the district court relied upon Ambassador Finger's testimony that Kungys' residence in Kedainiai would not, standing alone, have raised any questions in his mind. *Id.* at 1144.

Yet, Ambassador Finger's testimony regarding Kedainiai is more a statement about his memory of a town in Lithuania, than it is a statement about the materiality of Kungys' misrepresentation regarding his wartime residence. Ambassador Finger testified at the trial that he did not specifically remember the name of Kedainiai, 793 F.2d at 532 n. 11, thirty-five years after serving as a vice-consul.

The Third Circuit reasoned that Finger's statement about Kedainiai is of little significance given the content of his entire testimony. The court stated:

[T]he import of his testimony is that a key factor in eligibility was the applicant's relationship, if any, with the occupying

(Soviet-source depositions used); *United States v. Linnas*, 527 F. Supp. 426, 433-34 & n. 16 (E.D.N.Y. 1981); *United States v. Osidach*, 513 F. Supp. 51, 58 n. 2 (E.D.Pa. 1981); *United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981) (refusing to prevent taking of depositions in Latvia). It has also been admitted in other, non-deportation, cases. See, e.g., *Petition of Yuska*, 128 Misc. 2d 98, 488 N.Y.S. 2d 609 (1985).

Moreover, testimony of Soviet witnesses has been used consistently in West German war crime trials. See, e.g., *People v. Kurt Christman*, L.G.E. Munich, F.R.G. (Dec. 19, 1980); *People v. Viktors Arajs*, L.G.E. Hamburg, F.R.G. (Dec. 21, 1979).

In the case at bar, the court of appeals found that the trial court should not have automatically excluded the videotaped testimony. 793 F.2d at 520. The district court's determination declaring "the Soviet authorities are outside the jurisdiction of the United States judicial system" is irrelevant to the admissibility of foreign evidence. The Federal Rules of Civil Procedure provide for the taking of testimonial evidence outside of the United States. Yet, Fed. R. Civ. P. 28(b) notwithstanding, the district court determined its standard of examination to be one of "particular care." See 571 F. Supp. at 1124.

In essence, admissibility seems merely to be a function of the extent to which the evidence exculpates Kungys. Soviet testimonial evidence was admitted when it impeached the credibility of the inculpatory Soviet witnesses; 571 F. Supp. at 1124, while other Soviet testimonial evidence concerning Kungys' complicity in the Kedainiai killings was not admitted.

Nazi forces. As he testified, one way to determine the nature of such a relationship was to look at the occupant's residences during the period of occupation. It is undisputed that Kedainiai, in July and August of 1941, was the site of Nazi murders and that the defendant resided there during that period.

Id. This is the more sensible view of Ambassador Finger's testimony concerning the materiality of Kungys's misrepresentations about his wartime residence. Furthermore, Ambassador Finger stated that Kungys' wartime employment in a management capacity in a 15-employee brush and broom factory in Kaunas might have prompted him to probe further at the personal interview. 571 F. Supp. at 1144. Taken together with Kungys' other lies, residence in Kedainiai would have aroused suspicion about his relationship with the occupying Nazi forces. As the prevailing regulations then required, suspicion would have turned into investigation, 22 C.F.R. § 61.329 (Supp. 1946)—an investigation which might have led to facts justifying denial of citizenship.

Finally, Kungys seeks to credit Ambassador Finger's testimony concerning his residence in Kedainiai, 571 F. Supp. at 1137, yet at the same time discredit the Ambassador's testimony concerning the requirements for obtaining a nonpreference visa, i.e., only victims of Nazi persecution. 571 F. Supp. at 1137 n. 7. *See* petitioner's brief at 4, 5, 17, 31, 32. It is transparently clear that Kungys' view of Finger's credibility is merely a function of the degree to which Ambassador Finger's testimony inculcates him.

C. The Government Has Met Its Burden To Show Kungys' Willful Misrepresentations And Concealments Were Material

This case centers around four major lies: date of birth, place of birth, wartime residence and wartime occupation. The government has proven by clear and convincing evidence that Kungys willfully misrepresented the facts and deliberately concealed the truth concerning these four basic elements of his identity. 571 F. Supp. at 1137. Moreover, the government has shown that Kungys resided in Kedainiai during July and August of 1941, was a member of the

Sauliai, and worked as a bookkeeper-clerk in the Kaunas brush and broom factory during the 1941-44 period.

The uncontroverted testimony of Vice-Consul Finger and Immigration Judge Goldberg establishes that had Kungys told the truth at either the visa or naturalization stage, an investigation would have occurred. Beyond the discovery of the disqualifying fact that Kungys was not entitled to the visa he obtained, 793 F.2d at 531, what such an investigation would have revealed is difficult to state with absolute certainty. However, certainty is not the standard in this case. It is enough that the truth would have led to an investigation possibly resulting in facts warranting the denial of Kungys' citizenship.

Forty years after Kungys lied to obtain a visa, the government has uncovered his fundamental misrepresentations concerning his identity and wartime residence. Had Kungys not blocked the government's course of inquiry at the time when the facts were fresh and the evidence accessible, *a fortiori*, more could have been discovered about Jouzas Kungys and the lies he told. *United States v. Palciauskas*, 734 F.2d at 628. By depriving the government of its right to conduct an investigation which might have led to facts justifying denial of citizenship, Kungys' misrepresentations and concealments were material. Therefore, pursuant to 8 U.S.C. § 1451(a), Kungys should be denaturalized.

CONCLUSION

For all the reasons set forth herein the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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EDITOR'S NOTE

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No. 86-228-CFX
Status: GRANTED

Title: Juozas Kungys, Petitioner
v.
United States

Docketed:
August 9, 1986

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Williamson, Donald J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1986	G	Petition for writ of certiorari filed.
2	Aug 9 1986		Appendix of petitioner Juozas Kungys filed.
4	Sep 11 1986		Order extending time to file response to petition until October 9, 1986.
5	Oct 9 1986		Brief of respondent United States in opposition filed.
6	Oct 8 1986		Brief amicus curiae of Ukrainian American Bar Assn. filed.
7	Oct 15 1986		DISTRIBUTED. October 31, 1986
9	Nov 3 1986		REDISTRIBUTED. November 7, 1986
10	Nov 10 1986		Petition GRANTED. *****
12	Nov 14 1986		Order extending time to file brief of petitioner on the merits until January 12, 1987.
13	Dec 24 1986		Record filed.
14	Dec 24 1986		Certified copy of original record, 2 boxes, received.
15	Jan 10 1987		Lodging received. (10 copies).
16	Jan 12 1987		Joint appendix filed.
17	Jan 12 1987		Brief of petitioner Juozas Kungys filed.
19	Feb 5 1987		Order extending time to file brief of respondent on the merits until March 4, 1987.
20	Mar 4 1987	G	Motion of World Jewish Congress for leave to file a brief as amicus curiae filed.
21	Mar 4 1987		Brief of respondent United States filed.
22	Mar 4 1987	G	Motion of Anti-Defamation League of B'nai B'rith, et al. for leave to file a brief as amici curiae filed.
23	Mar 13 1987		CIRCULATED.
24	Mar 11 1987		SET FOR ARGUMENT. Monday, April 27, 1987. (2nd case).
25	Mar 23 1987		Motion of World Jewish Congress for leave to file a brief as amicus curiae GRANTED.
26	Mar 23 1987		Motion of Anti-Defamation League of B'nai B'rith, et al. for leave to file a brief as amici curiae GRANTED.
28	Apr 11 1987	X	Reply brief of petitioner Juozas Kungys filed.
29	Apr 15 1987	D	Motion of petitioner for leave to file a reply brief to the briefs of the amici curiae filed.
30	Apr 27 1987		Motion of petitioner for leave to file a reply brief to the briefs of the DENIED.
31	Apr 27 1987		ARGUED.
32	Jun 26 1987		The case is restored to the calendar for reargument. The parties are directed to file supplemental briefs
33	Jun 26 1987		addressing the following questions: (1) whether petition is subject to denaturalization for want of good
34	Jun 26 1987		moral character under 8 U.S.C. Sections 1451(a), 1427(a), and 1191(f)(6), with particular attention to:

Entry	Date	Note	Proceedings and Orders
35	Jun 26 1987		(a) whether the "false testimony" provision of 8 U.S.C. Section 1101(f)(6) should be interpreted to
36	Jun 26 1987		include a requirement that the false testimony concern a
37	Jun 26 1987		material fact; (b) what standards should govern
38	Jun 26 1987		the determination under 8 U.S.C. Section 1101(f)(6)
39	Jun 26 1987		whether "false testimony" has been given "for the
40	Jun 26 1987		purpose of obtaining any benefits under <u>this</u>
41	Jun 26 1987		chapter..."; and (c) whether the latter determination is
42	Jun 26 1987		one of law or fact. (2)(a) Should the materiality
43	Jun 26 1987		standard articulated in Chaunt v. United States,
44	Jun 26 1987		364 U.S. 350 (1960) be abandoned and, if so, what
45	Jun 26 1987		standard should govern the materiality inquiry under
46	Jun 26 1987		8 U.S.C. Section 1451(a); and (b) is the determination
47	Jun 26 1987		of materiality under 8 U.S.C. Section 1451(a)
48	Jun 26 1987		must any further showing be made to establish that
49	Jun 26 1987		citizenship was "procured by" that misrepresentation.
50	Jun 26 1987		The parties also may address the questions presented in
51	Jun 26 1987		the petition for certiorari. The parties are
52	Jun 26 1987		directed to file opening briefs on or before August 3,
53	Jun 26 1987		1987. Closing briefs are to be filed on or before
	Jun 26 1987		August 24, 1987. (All amicus curiae briefs are due on or
	Jun 26 1987		before August 3, 1987.)
	Jul 20 1987		SET FOR ARGUMENT. Tuesday, October 13, 1987. (1st case).
	Aug 3 1987		Supplemental brief of petitioner Juozas Kungys filed.
	Aug 3 1987		Supplemental brief of respondent United States filed.
	Aug 3 1987		Brief amicus curiae of Baltic-Ukrainian-American Compact, et
	Aug 3 1987		al. filed.
	Aug 6 1987		CIRCULATED.
	Aug 21 1987	X	Reply brief of petitioner Juozas Kungys filed.
	Aug 24 1987	X	Reply brief of respondent United States filed.
	Oct 13 1987		ARGUED.

(13)
No. 86-228

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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4182

TABLE OF CONTENTS

	Page
Introduction and summary of argument	1
Argument:	
I. Petitioner is subject to denaturalization for want of good moral character because he gave false testimony for the purpose of obtaining benefits under the immigration laws	5
A. Section 1101(f) (6) contains no materiality requirement	5
B. The determination whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter" should be governed by the usual standards of proof in immigration cases	19
C. The determination whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter" is partly one of fact and partly one of law....	21
II. The overall approach to materiality in <i>Chaunt v. United States</i> is correct, but the standard adopted in that case should be simplified	22
A. The <i>Chaunt</i> Court correctly concluded that the government is not required to prove an ultimate disqualifying fact in order to establish materiality	22
B. The Court should simplify the materiality standard announced in <i>Chaunt</i> by adopting the standard applicable in perjury and false statement cases	26
III. The requirement that citizenship be "procured by" a material-misrepresentation under Section 1451(a) simply makes clear that the misrepresentation must have been made in the course of the visa or naturalization proceedings	30
Conclusion	34

II

TABLE OF AUTHORITIES

Cases:	Page
<i>Berenyi v. District Director</i> , 385 U.S. 630 (1967) ..	10, 18, 19, 20, 21
<i>Board of Governors v. Dimension Financial Corp.</i> , No. 84-1274 (Jan. 22, 1986)	15
<i>Carroll v. United States</i> , 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927)	18
<i>Corrado v. United States</i> , 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956)	22
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960)	passim
<i>Costello v. United States</i> , 365 U.S. 265 (1961)	23
<i>Ensign v. Pennsylvania</i> , 227 U.S. 592 (1913)	14
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981), aff'g 597 F.2d 946 (5th Cir. 1979)	9, 10, 26-27, 28
<i>G, In re</i> , 6 I. & N. Dec. 208 (1954)	14
<i>GLT, In re</i> , 8 I. & N. Dec. 403 (1959)	13
<i>Granduze y Marino v. Murff</i> , 183 F. Supp. 565 (S.D.N.Y. 1959), aff'd, 178 F.2d 330 (2d Cir.), cert. denied, 364 U.S. 824 (1960)	23
<i>Haniatakis, In re</i> , 376 F.2d 728 (3d Cir. 1967)	8, 15
<i>INS v. Cardoza-Fonseca</i> , No. 85-782 (Mar. 9, 1987)	14
<i>INS v. Hector</i> , No. 86-21 (Nov. 17, 1986)	14, 15
<i>INS v. Phinpathya</i> , 464 U.S. 183 (1984)	14, 15
<i>Kassab v. INS</i> , 364 F.2d 806 (6th Cir. 1966)	24, 27
<i>Kovacs v. United States</i> , 476 F.2d 843 (2d Cir. 1973)	8, 15
<i>La Madrid-Peraza v. INS</i> , 492 F.2d 1297 (9th Cir. 1974)	24
<i>Langhammer v. Hamilton</i> , 295 F.2d 642 (1st Cir. 1961)	24
<i>Maikovskiz v. INS</i> , 773 F.2d 435 (2d Cir. 1985), cert. denied, No. 85-1483 (June 16, 1986)	27
<i>Moy Wing Yin, In re</i> , 167 F. Supp. 828 (S.D.N.Y. 1958)	17
<i>Ngan, In re</i> , 10 I. & N. Dec. 725 (1964)	13
<i>NLRB v. Amaz Coal Co.</i> , 453 U.S. 322 (1981)	24
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982) ..	21
<i>Ralich v. United States</i> , 185 F.2d 784 (8th Cir. 1950)	17

III

Cases—Continued:

	Page
<i>Robles v. United States</i> , 279 F.2d 401 (9th Cir. 1960), cert. denied, 365 U.S. 836 (1961)	18
<i>Russell v. United States</i> , 369 U.S. 749 (1962)	21
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943)	10, 20
<i>Sharaiha v. Hoy</i> , 169 F. Supp. 598 (S.D. Cal. 1959)	13
<i>Sinclair v. United States</i> , 279 U.S. 263 (1929)	21
<i>TSC Industries, Inc. v. Northway, Inc.</i> , 426 U.S. 438 (1976)	25
<i>Tieri v. INS</i> , 457 F.2d 391 (2d Cir. 1972)	17
<i>United States v. Bridges</i> , 717 F.2d 1444 (D.C. Cir. 1983), cert. denied, 465 U.S. 1036 (1984)	21
<i>United States v. Chandler</i> , 152 F. Supp. 169 (D. Md. 1957)	23
<i>United States v. Corsino</i> , 812 F.2d 26 (1st Cir. 1987)	21
<i>United States v. Greber</i> , 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985)	21
<i>United States v. Gremillion</i> , 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972)	18
<i>United States v. Irwin</i> , 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982)	21
<i>United States v. Koziy</i> , 728 F.2d 1314 (11th Cir.), cert. denied, 469 U.S. 835 (1984)	24
<i>United States v. Lopez</i> , 728 F.2d 1359 (11th Cir.), cert. denied, 469 U.S. 828 (1984)	18
<i>United States v. Lumantes</i> , 139 F. Supp. 574 (N.D. Cal. 1955), aff'd, 232 F.2d 216 (9th Cir. 1956)	23
<i>United States v. Montalbano</i> , 236 F.2d 757 (3d Cir.), cert. denied, 352 U.S. 952 (1956)	22
<i>United States v. Oddo</i> , 314 F.2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963)	24, 27
<i>United States v. One Lear Jet</i> , 808 F.2d 765 (11th Cir. 1987), petition for cert. pending, No. 86-1725	28
<i>United States v. Palciauskas</i> , 734 F.2d 625 (11th Cir. 1984)	24

IV

Cases—Continued:

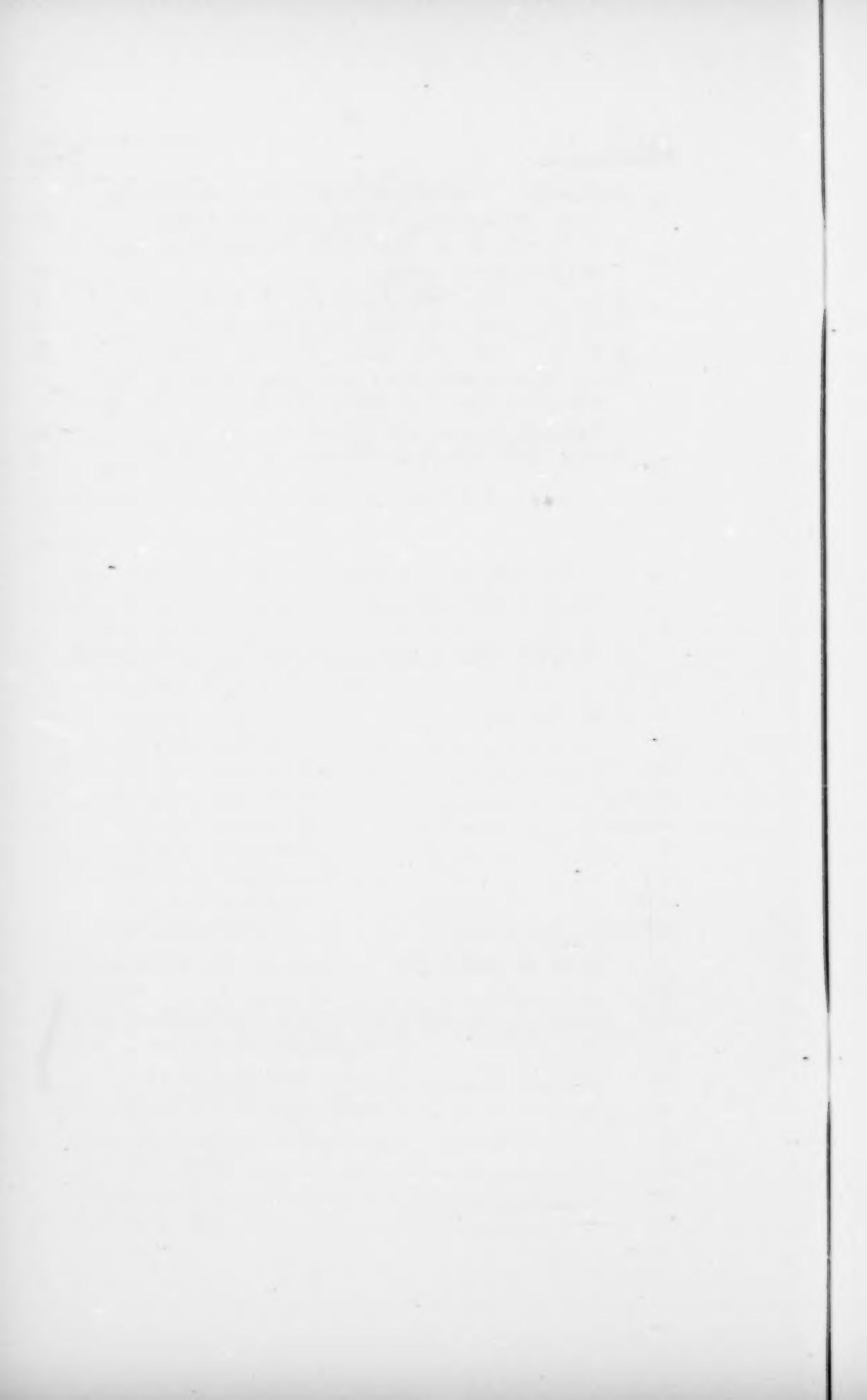
Page

<i>United States v. Ramos</i> , 725 F.2d 1322 (11th Cir. 1984)	18
<i>United States v. Richardson</i> , 596 F.2d 157 (6th Cir. 1979)	21
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (10th Cir. 1983)	9, 24, 28, 31
<i>United States v. Valdez</i> , 594 F.2d 725 (9th Cir. 1979)	18, 21
<i>United States v. Watson</i> , 623 F.2d 1198 (7th Cir. 1980)	21
<i>Yao Quinn Lee, In re</i> , 480 F.2d 673 (2d Cir. 1973)	17
<i>Zabala, In re</i> , 573 F. Supp. 665 (E.D.N.Y. 1983)	9

Statutes:

Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601....	30
Displaced Persons Act of 1948, ch. 647, § 10, 62 Stat. 1013	9
Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 <i>et seq.</i>	11
8 U.S.C. 1101 (f)	2, 6, 7, 8, 10, 11, 15
8 U.S.C. 1101 (f) (1)	6
8 U.S.C. 1101 (f) (3)	15
8 U.S.C. 1101 (f) (5)	6, 8, 10
8 U.S.C. 1101 (f) (6)	<i>passim</i>
8 U.S.C. 1101 (f) (8)	6
8 U.S.C. 1182 (a) (23)	15
8 U.S.C. 1427 (a)	2, 6
8 U.S.C. 1451 (a)	<i>passim</i>
Nationality Act of 1940, ch. 876, § 340, 54 Stat. 1160	30
Pub. L. No. 87-301, § 18, 75 Stat. 656	11
Pub. L. No. 97-116, 95 Stat. 1611:	
§ 2 (c) (1), 95 Stat. 1611	15
§ 2 (c) (2), 95 Stat. 1611	15
8 U.S.C. (1940 ed.) 709 (a)	7
18 U.S.C. 1001	17
18 U.S.C. 1621	17
18 U.S.C. 1623	17

Miscellaneous:	Page
Appleman, <i>Misrepresentation in Immigration Law: Materiality</i> , 22 Fed. B.J. 267 (1962)	27
3 C. Gordon & H. Rosenfield, <i>Immigration Law and Procedure</i> (1986)	27
H.R. Conf. Rep. 2096, 82d Cong., 2d Sess. (1952) ..	7
H.R. Rep. 1365, 82d Cong., 2d Sess. (1952)	7
H.R. Rep. 1086, 87th Cong., 1st Sess. (1961)	11
Note, <i>Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot</i> , 48 Fordham L. Rev. 471 (1980)	25
S. Rep. 1137, 82d Cong., 2d Sess. Pt. 1 (1952)	7



In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-228

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 26, 1987, this Court restored the present case to the calendar for reargument and directed the parties to file supplemental briefs addressing the following questions:

(1) Whether petitioner is subject to denaturalization for want of good moral character under 8 U.S.C. §§ 1451(a), 1427(a), and 1101(f)(6), with particular attention to:

(a) whether the "false testimony" provision of 8 U.S.C. § 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

(1)

(b) what standards should govern the determination under 8 U.S.C. § 1101(f)(6) whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter"; and

(c) whether the latter determination ~~is~~ one of law or fact.

(2) (a) Should the materiality standard articulated in *Chaunt v. United States*, 364 U.S. 350 (1960) be abandoned and, if so, what standard should govern the materiality inquiry under 8 U.S.C. § 1451(a); and

(b) is the determination of materiality under 8 U.S.C. § 1451(a) one of law or fact.

(3) When a misrepresentation has been established as "material" within the meaning of 8 U.S.C. § 1451(a), must any further showing be made to establish that citizenship was "procured by" that misrepresentation.

I. A person who obtains citizenship without possessing good moral character has "illegally procured" that citizenship and is subject to denaturalization (8 U.S.C. 1427(a), 1451(a)). Under 8 U.S.C. 1101(f), certain categories of individuals are precluded from claiming that they possess good moral character. The provision at issue in the present case, 8 U.S.C. 1101(f)(6), identifies one such category: persons who have "given false testimony for the purpose of obtaining any benefits under [the immigration laws]."

As the language of Section 1101(f)(6) reveals, there is no requirement that the false testimony be material. Nor is there any basis either in the history or purpose of Section 1101(f)(6) for courts to impose a materiality requirement. Even if, in hindsight, an applicant's false testimony turns out to be

immaterial, the fact remains that the applicant deliberately lied under oath to government officials for the purpose of obtaining benefits under the immigration laws. Such an applicant lacks good moral character.

Enforcing Section 1101(f)(6) as it was drafted does not mean that the government can freely obtain denaturalization of individuals for trivial misstatements or omissions. To begin with, the statute is limited to "testimony," *i.e.*, oral statements under oath. The statute does not reach other types of misrepresentations or concealments, such as falsified documents or statements not made under oath. Moreover, the declarant's purpose in lying must have been to obtain immigration benefits, and at the denaturalization stage, the government must prove by clear, unequivocal, and convincing evidence that the declarant gave the false testimony for that purpose.

If, despite the statutory language, the Court concludes that Section 1101(f)(6) must be read to contain a materiality requirement, we submit that the governing standard should be the one applicable under the perjury and false statement statutes, *i.e.*, whether the testimony had a natural tendency to influence, or was capable of influencing, the government official rendering the decision. A more exacting materiality standard would lead to the anomalous result that a person could be guilty of perjury yet still be viewed as possessing good moral character.

In determining whether someone has given false testimony in order to obtain immigration benefits, the trier of fact should consider all the relevant evidence in the case. The issues of whether the testimony is false and whether the declarant's purpose

was to obtain immigration benefits are factual in nature. However, the issue of whether the statements constitute "testimony" is one of law. Similarly, if Section 1101(f)(6) is interpreted to contain a materiality requirement, the issue of materiality is one of law.

In the present case, the government established (and the trial court found (Pet. App. 120a)) that petitioner gave false testimony for the purpose of obtaining immigration benefits. If materiality is required, we submit that petitioner's false testimony was material, for the reasons that we have previously explained (Gov't Br. 29-45).

II. In addition to the illegal procurement ground for denaturalization, a person is subject to denaturalization if he has made a material misrepresentation or concealed a material fact in the course of obtaining his citizenship (8 U.S.C. 1451(a)). The applicable materiality test, as announced in *Chaunt v. United States*, 364 U.S. 350 (1960), does not require the government to prove that the applicant misrepresented or concealed some fact that would have resulted in his disqualification.

While we agree with the conclusion in *Chaunt* that the government need not prove an ultimate disqualifying fact, we believe that the Court's formulation of the materiality standard in that case has led to unnecessary confusion. Accordingly, it is our submission that the Court should adopt the standard of materiality that has been applied in perjury and false statement cases. That inquiry, which is one of law, is straightforward and has proved easy to apply.

III. Under Section 1451(a), the government must prove that citizenship was "procured by" a misrepre-

sentation or concealment. In our view, that phrase is intended merely to make clear that the false statement must have been made during the application process. It should not be read to mean that "but for" the misstatement, the applicant would not have obtained citizenship. Such a reading would render the entire misrepresentation ground for denaturalization superfluous; if the government can prove a disqualifying fact, it has, by definition, established illegal procurement, and the misrepresentation would be irrelevant. Moreover, such an interpretation would wipe out over three decades of case law holding that, to denaturalize someone for a misrepresentation under Section 1451(a), the government need not prove an ultimate disqualifying fact.

ARGUMENT

I. PETITIONER IS SUBJECT TO DENATURALIZATION FOR WANT OF GOOD MORAL CHARACTER BECAUSE HE GAVE FALSE TESTIMONY FOR THE PURPOSE OF OBTAINING BENEFITS UNDER THE IMMIGRATION LAWS

A. Section 1101(f)(6) Contains No Materiality Requirement

1.a. Under 8 U.S.C. 1451(a), a person whose naturalization was "illegally procured" is subject to denaturalization.¹ A necessary prerequisite to naturalization is that the person be of good moral character

¹ Section 1451(a) also provides that a naturalized citizen is subject to denaturalization if his citizenship was "procured by concealment of a material fact or by willful misrepresentation." For simplicity, we refer to this alternative basis for denaturalization as "the misrepresentation clause of Section 1451(a)."

(8 U.S.C. 1427(a)). In 8 U.S.C. 1101(f), Congress set out minimum standards of "good moral character."² At issue in the present case is one such standard—that involving the duty to give truthful testimony to government officials. Under 8 U.S.C. 1101(f)(6), no person shall be deemed to be of good moral character if he "has given false testimony for the purpose of obtaining any benefits under this chapter[.]" Section 1101(f)(6), by its terms, contains no materiality requirement. All that is required is that there be false testimony and that such testimony be given with the intent to obtain benefits under the immigration laws.

The absence of a materiality requirement in Section 1101(f)(6) reflects Congress's special concern with the moral character of applicants for citizenship. Unlike the misrepresentation clause of Section 1451(a), which concerns itself with information-gathering (see generally *Chaunt v. United States*, 364 U.S. 350, 352-353 (1960)), Section 1101(f)(6) reflects Congress's view that a lack of good moral character is shown by the subjective intent to obtain immigration benefits through deception and dishonesty. The fact that, in hindsight, the misrepresentations may be found to pertain to matters that were not material does not erase the prior act of dishonesty. If the evidence indicates that the lies, even ultimately immaterial lies, were made with the specific intent to obtain immigration benefits, the individual

² For example, a person lacks good moral character if he is "a habitual drunkard" (Section 1101(f)(1)), if he "has been convicted of two or more gambling offenses committed during [the relevant] period" (Section 1101(f)(5)), and if "at any time [he] has been convicted of the crime of murder" (Section 1101(f)(8)).

who uttered those lies does not deserve the privilege of citizenship.

b. The legislative history of Section 1101(f)(6) is entirely consistent with the plain language of that provision. We have found nothing to suggest that, despite the wording of Section 1101(f)(6), Congress meant for that provision to apply only to "material" false testimony. To the contrary, the care and attention that Congress gave to the enumeration of the categories in Section 1101(f) suggests that it fully expected the courts to enforce the provisions of Section 1101(f) as written.

The requirement of good moral character has been a feature of the immigration laws for many years. See 8 U.S.C. (1940 ed.) 709(a) (requiring proof that "petitioner is and during all such [relevant] period has been a person of good moral character * * *"). In 1952, Congress rewrote the immigration laws, but it "carrie[d] forward the provision * * * that the petitioner for naturalization shall * * * have been a person of good moral character * * * ." H.R. Rep. 1365, 82d Cong., 2d Sess. 80 (1952). Unlike the House bill, the Senate bill provided for minimum standards of good moral character.³ The conferees agreed to adopt the Senate provision. See H.R. Conf. Rep. 2096, 82d Cong., 2d Sess. 128 (1952) (Statement of the Managers on the Part of the House).

³ In so providing, the Senate was responding to the uncertainty surrounding the good moral character requirement in prior law. The Senate Report explained (S. Rep. 1137, 82d Cong., 2d Sess. Pt. 1, at 6 (1952)) that "[b]y providing who shall not be regarded as a person of good moral character, it is believed that a greater degree of uniformity will be obtained in the application of the 'good moral character' tests under the provisions of the bill."

Accordingly, Section 1101(f) lists several categories of prior conduct that require disqualification on moral character grounds. Any person who fits within any of eight enumerated categories may not be found to be a person of good moral character. Given this background, it would upset the purpose of Section 1101(f) for courts to tinker with the disqualifying provisions, for example, by reading a materiality requirement into Section 1101(f)(6). This point is underscored by the obvious inappropriateness of reading a materiality requirement into any of the other categories of Section 1101(f). For example, no one would seriously suggest that a person "convicted of two or more gambling offenses" (8 U.S.C. 1101(f)(5)) should be treated as having bad moral character only if the offenses in some way interfered with the administration of the immigration laws. Nor would it be appropriate for a court to limit that provision to "serious" gambling offenses. It likewise makes no sense to say that a person who has given false testimony for the purpose of obtaining benefits under the immigration laws should be treated as lacking good moral character only if his false testimony was material to his visa or citizenship application.

c. Consistent with the language and history of Section 1101(f)(6), several courts have ruled that, for purposes of naturalization proceedings, Section 1101(f)(6) contains no materiality requirement and that even immaterial testimony, if given with the intent to obtain immigration benefits, is sufficient to demonstrate a lack of good moral character. See, e.g., *Kovacs v. United States*, 476 F.2d 843, 844-845 (2d Cir. 1973); *In re Haniatakis*, 376 F.2d 728, 730 (3d Cir. 1967) ("The statute is not concerned with

the significance or materiality of a particular question, but rather * * * intends that naturalization should be denied to one who gives false testimony.”); *In re Zabala*, 573 F. Supp. 665, 668 (E.D.N.Y. 1983).

Despite the plain language of Section 1101(f)(6), however, both the Third Circuit (in the decision below (Pet. App. 23a-28a)) and the Tenth Circuit (*United States v. Sheshtawy*, 714 F.2d 1038 (1983)) have taken the position that, for purposes of denaturalization, Section 1101(f)(6) requires that the false testimony be material. In reaching that conclusion, those courts erred on two critical points.

First, the courts erroneously relied (Pet. App. 25a; 714 F.2d at 1041) on this Court’s decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), in which the Court construed Section 10 of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1013 (DP Act).⁴ The government conceded, and the Court agreed (*Fedorenko*, 449 U.S. at 507), that that provision is violated only by a material misrepresentation. But the provision at issue in *Fedorenko* is not one dealing with moral character. Rather, the breadth of Section 10 of the DP Act makes it more analogous to the misrepresentation clause of Section 1451(a), a provision that requires proof of materiality. See *Fedorenko*, 449 U.S. at 507-508 n.28 (relying on the misrepresentation clause of Section 1451(a) in construing Section 10 of the DP Act). As discussed above, false testimony given to obtain immigration benefits has particular relevance to the ques-

⁴ Section 10 of the DP Act provided that any person who makes a willful misrepresentation in order to gain admission into the United States shall thereafter not be admissible (see *Fedorenko*, 449 U.S. at 507).

tion of moral character, even if such testimony is immaterial. The provision involved in *Fedorenko* is therefore not controlling on the construction of Section 1101(f)(6).

Second, the court below and the *Sheshtawy* court concluded that Section 1101(f)(6) could be read two different ways, depending on whether naturalization or denaturalization is at issue (Pet. App. 25a-26a; 714 F.2d at 1041 n.6). That result, however, cannot be correct; while the stage of the proceeding determines which side has the burden of proof,⁵ it does not determine the substantive statutory requirements. See generally *Fedorenko*, 449 U.S. at 506 (citing authority for the proposition that the failure to meet the requirements for naturalization renders citizenship illegally procured and entitles the government to seek denaturalization).⁶ Moreover, there is nothing in the text or history of the immigration statute to support a different reading of the requirements of Section 1101(f)(6) at different stages of the proceedings. Indeed, congressional action subsequent to the enactment of Section 1101(f) suggests that the opposite is true.

⁵ In applying for naturalization, the applicant bears the burden of proof (e.g., *Berenyi v. District Director*, 385 U.S. 630, 637 (1967)), whereas in a denaturalization proceeding, the government bears the burden of proof and must meet that burden by clear, unequivocal, and convincing evidence (e.g., *Schneiderman v. United States*, 320 U.S. 118, 125 (1943)).

⁶ Once again, the point is best illustrated by reference to other provisions of Section 1101(f). For example, it would plainly be incorrect to read Section 1101(f)(5)—which provides that someone with two gambling convictions during the relevant period lacks good moral character—to authorize denaturalization only if the citizen had at least four such convictions.

In 1961, Congress restored illegal procurement as a basis for denaturalization (Pub. L. No. 87-301, § 18, 75 Stat. 656 (amending 8 U.S.C. 1451(a)).⁷ As the legislative history reveals, Congress was particularly concerned that individuals who lacked good moral character, and who therefore were ineligible for citizenship, were not subject to denaturalization because the government could not meet the requirements of the misrepresentation clause of Section 1451(a). See H.R. Rep. 1086, 87th Cong., 1st Sess. 39 (1961). The House Report noted (*ibid.*) that while Section 1101(f) "spells out in detail the type of conduct which precludes an alien from establishing good moral character," the requirement under the 1952 statute "that willful misrepresentation and so forth must be established render[ed] that section of the law inoperative, notwithstanding its clear and unmistakable purpose and intent." Accordingly, Congress restored illegal procurement as a basis for denaturalization for the specific purpose of enabling the government to proceed against individuals who lacked good moral character when they obtained their citizenship. Having concluded that the provisions of Section 1101(f) should provide a basis for denaturalization, Congress nowhere suggested that Section 1101(f)(6) should be treated differently from the other subsections of Section 1101(f) or that, for purposes of denaturalization, it should be read to reach only material false testimony. Had Congress intended to exclude Section 1101(f)(6) as a ground

⁷ Although illegal procurement existed as a ground for denaturalization prior to 1952, it was deleted when Congress passed the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 *et seq.*

for proving illegal procurement, it could easily have done so.

d. The absence of a materiality requirement does not make every intentional misstatement to the immigration authorities a basis for subsequent denaturalization. By the same token, interpreting Section 1101(f)(6) not to require a showing of materiality does not conflict with this Court's decision in *Chaunt v. United States*, 364 U.S. 350 (1960).

The concerns addressed by Section 1101(f)(6) differ from those advanced by the misrepresentation clause of Section 1451(a); each provision therefore has distinct elements. While Section 1101(f)(6) does not contain a materiality requirement, it is substantially limited by the requirement of proof of intent: the misrepresentations must have been made "for the purpose of obtaining any benefits under [the immigration laws]." It is only dishonesty accompanied by this precise intent that Congress found morally unacceptable. Willful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character. Moreover, the requirement of an intent to obtain immigration benefits imposes a heavy burden on the government at the denaturalization stage, since the government must prove its case by clear, unequivocal, and convincing evidence. It would be very difficult, for example, for the government to establish the requisite intent based on a single immaterial misrepresentation, at least in the absence of other evidence bearing on intent. On the other hand, in a case such as this one, where there has been a *pattern* of false testimony before the im-

migration authorities, the likelihood that the lies were made to obtain benefits under the immigration laws is much greater.

In contrast to Section 1101(f)(6), the misrepresentation clause of Section 1451(a) is concerned primarily with the accuracy and completeness of the information provided to immigration authorities; the purpose of the statute is to enable the authorities to ascertain the applicant's qualifications. See generally *Chaunt*, 364 U.S. at 352-353. The government's failure to learn of purely immaterial facts does not seriously impede its ability to rule on such applications. For that reason, unlike Section 1101(f)(6), the misrepresentation clause of Section 1451(a) requires that the false statements or concealments be material. On the other hand, the misrepresentation clause does not require that the applicant have the specific intent to obtain immigration benefits; instead, it requires merely that the misrepresentation or concealment be "willful" rather than inadvertent.

An additional distinction is that Section 1101(f)(6) applies only to false "testimony," whereas the misrepresentation clause of Section 1451(a) is more open-ended. Under the case law, "testimony" is limited to *oral* statements made under oath. See, e.g., *Sharaiha v. Hoy*, 169 F. Supp. 598, 601 (S.D. Cal. 1959) (emphasis in original) (for purposes of Section 1101(f)(6), "*testimony*, technically construed, refers solely to the *oral* utterances of *witnesses* under oath"); *In re Ngan*, 10 I. & N. Dec. 725, 726 (1964) (testimony defined as oral statements under oath); *In re GLT*, 8 I. & N. Dec. 403, 404-405 (1959) (answers given under oath in a question-and-answer session in connection with an application for natural-

ization constitute testimony); *In re G*, 6 I. & N. Dec. 208 (1954) (document not subscribed to under oath is not testimony). See also *Ensign v. Pennsylvania*, 227 U.S. 592, 599 (1913) ("The word 'testimony' more properly refers to oral evidence."). Congress quite reasonably viewed false "testimony" as more indicative of bad moral character than other types of misrepresentations or omissions. "Testimony" is given under oath and is the product of face-to-face questioning by an official who can ascertain whether the applicant understands the questions.

Unlike Section 1101(f)(6), the misrepresentation clause of Section 1451(a) applies to concealments as well as misrepresentations, and is broad enough to include, *inter alia*, false applications and false unsworn oral statements. Again, the difference in the provisions reflects the difference in the purposes they serve: The objective of proper information-gathering is equally frustrated regardless of the form of the false statement or concealment.

2.a. Since the language of Section 1101(f)(6) is clear, and since the legislative history does not reflect a " 'clearly expressed legislative intention' contrary to that language," *INS v. Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10 n.12, this Court should not read a materiality requirement into that section. See *INS v. Hector*, No. 86-21 (Nov. 17, 1986) (relying on unambiguous statutory language and holding that court of appeals erred in interpreting the term "child" in the immigration statutes to include other close relatives, such as nieces); *INS v. Phinpathya*, 464 U.S. 183 (1984) (applying plain language of statute and holding that any break in requisite seven-year period of physical presence precludes alien from obtaining suspension of deporta-

tion); see generally *Board of Governors v. Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6. If Congress decides that the effects of applying the statute as written are too harsh, it can modify the statute. See generally *Hector*, slip op. 6 n.7 (citing congressional enactment overruling *Phinpathya* and noting that "Congress has shown that it is willing to correct inequities that might result in [the Court's] applying the plain language of the suspension of deportation provision"). Indeed, in 1981 Congress amended Section 1101(f) to eliminate the provision that automatically classified someone who had engaged in adultery during the relevant period as lacking good moral character. Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611.⁸ Yet, notwithstanding the holdings in *Haniatakis* (in 1967) and *Kovacs* (in 1973) that Section 1101(f)(6) contains no materiality requirement, Congress has not amended Section 1101(f)(6) to add such a requirement. Because of Congress's "close * * * attention" to Section 1101(f), and its failure to amend Section 1101(f)(6), the courts should be "especially bound to pay heed to the plain mandate of the words Congress has chosen" (*Hector*, slip op. 5 n.6).

b. Under the proper interpretation of Section 1101(f)(6), petitioner is subject to denaturalization, and there is no need for this Court to remand the case for further findings. The trial court specifically found that when he applied for naturalization, peti-

⁸ Congress also amended Section 1101(f)(3), under which a drug offender cannot establish good moral character (see 8 U.S.C. 1182(a)(23)), to provide that simple possession of a small quantity of marijuana does not demonstrate a lack of good moral character. Pub. L. No. 97-116, § 2(c)(2), 95 Stat. 1611.

tioner submitted documents that falsely stated that he had not previously given false testimony to obtain benefits under the immigration laws (Pet. App. 120a).⁹ While the documents themselves are not "testimony," the court's necessary underlying finding is that the oral statements petitioner made to the vice consul to obtain his visa¹⁰ constituted false testimony to obtain benefits under the immigration laws.

Petitioner gave similar false testimony at the naturalization stage. As we have described (Gov't Br. 8), petitioner was interviewed under oath by the preliminary naturalization examiner and later by the naturalization examiner. As part of those interviews, he was required to verify each answer on his application for citizenship. Since his citizenship application contained a variety of false answers, his verifications under oath constituted false testimony. Moreover, there is no plausible explanation for petitioner's lies except his desire to hide something in his past that might have interfered with his ability to obtain citizenship.

Based on this pattern of false testimony that was given for the purpose of obtaining immigration benefits, petitioner lacked the requisite good moral character at the time he obtained his citizenship. He is therefore subject to denaturalization on that ground.

⁹ The court went on to find, however, that petitioner's false statements were not material (Pet. App. 122a-137a), and to hold that Section 1101(f) (6) requires proof of materiality (Pet. App. 123a).

¹⁰ As we have indicated (Gov't Br. 7), the common practice at the time and place in question was that the vice consul interviewed visa applicants under oath and inquired into their biographical data.

3. If, despite the wording of Section 1101(f)(6), the Court concludes that a showing of materiality is required, we submit that the proper standard of materiality is the one that is applied in perjury cases.

a. There can be no reasonable dispute that a person who has committed perjury, as that offense is defined by statute,¹¹ is someone who lacks good moral character. See generally *In re Yao Quinn Lee*, 480 F.2d 673, 676-677 (2d Cir. 1973) (upholding denial of naturalization on ground that false statement by applicant that he was living with his wife demonstrated lack of good moral character); *Tieri v. INS*, 457 F.2d 391, 393 (2d Cir. 1972) (upholding denial of naturalization based on pattern of false testimony); *Ralich v. United States*, 185 F.2d 784, 788 (8th Cir. 1950) (commission of perjury demonstrates lack of good moral character); *In re Moy Wing Yin*, 167 F. Supp. 828, 830 (S.D.N.Y. 1958) (noting that perjury is a crime of moral turpitude). Therefore, no matter what standard of materiality this Court ultimately decides to adopt with respect to the misrepresentation clause of Section 1451(a) (see pages 22-30, *infra*), it cannot logically impose a higher standard than the criminal materiality standard in the context of Section 1101(f)(6). Otherwise, someone whose false testimony constitutes a serious federal offense could still be deemed a person of good moral character, an anomaly that Congress could not have intended.

The meaning of materiality in the criminal false statement statutes is clear and well settled. As we

¹¹ *E.g.*, 18 U.S.C. 1001 (concealment of a "material fact" in a matter within the jurisdiction of a department or agency of the United States); 18 U.S.C. 1621 (false statement under oath as to a "material matter"); 18 U.S.C. 1623 (false "material declaration" before a court or grand jury).

have explained (Gov't Br. 25-27), those statutes do not require proof of an ultimate disqualifying fact, but instead require only that the government prove that the false statement had a natural tendency to influence, or was capable of influencing, the tribunal or government official. See, *e.g.*, *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States v. Ramos*, 725 F.2d 1322 (11th Cir. 1984); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *United States v. Gremillion*, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); *Robles v. United States*, 279 F.2d 401, 404 (9th Cir. 1960), cert. denied, 365 U.S. 836 (1961); *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

In *Berenyi v. District Director*, 385 U.S. 630 (1967), this Court strongly suggested that if materiality is required under Section 1101(f)(6)—an issue the Court did not decide—the standard is no more demanding than the perjury standard. In *Berenyi*, certain false testimony, given in the course of naturalization, was found to be material, even though it almost certainly could not have satisfied any materiality standard higher than the perjury standard. The petitioner in *Berenyi* had answered "No" to the question whether he had ever "been a member of, or in any other way connected with, * * * the Communist Party * * *" (385 U.S. at 633). The district court found, contrary to the petitioner's testimony, that he had been associated with the Communist Party before applying for citizenship. This Court was willing to assume, for the purposes of analysis, that his membership would not have made him ineligible for citizenship because he was not "meaningfully associated" with that organization

(*id.* at 638). Nonetheless, the false testimony was found to be material because it could have affected the government's investigation. The Court stated that "the broader question asked of the petitioner was certainly material and relevant," and it noted that "[t]he Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised" (*ibid.*). The Court's language in *Berenyi* is identical to the materiality standard applied in the perjury context.

b. Under the perjury standard, petitioner's pattern of false testimony was material. The matters on which he testified falsely certainly fell within the ambit of those as to which the government has a right to true information "so that it may pursue leads and make further investigation if doubts are raised" (*Berenyi*, 385 U.S. at 638). Additionally, as we have explained (Gov't Br. 29-34), in light of petitioner's submission of false documents, an investigation would have followed (or his application would have been denied outright even without an investigation) if petitioner had told the truth at any stage of the visa or citizenship process. Under those circumstances, the false testimony was plainly capable of influencing the decisionmaker.

B. The Determination Whether "False Testimony" Has Been Given "For The Purpose Of Obtaining Any Benefits Under This Chapter" Should Be Governed By The Usual Standards of Proof In Immigration Cases

In making the determinations necessary under Section 1101(f)(6), the trial court should consider all information relevant to the inquiry. In deciding whether the testimony was false, it should evaluate

the testimonial, documentary, and physical evidence presented by both sides, attaching appropriate weight according to the circumstances. Similarly, in deciding whether false testimony was given with an intent to obtain immigration benefits, it should consider, among other things, the credibility of an applicant's explanation of his intent, whether the misrepresentations were the sort one might make in an attempt to gain benefits, whether there was a pattern of false testimony or merely an isolated incident, whether the applicant told the truth to other persons at other times, and any other inculpatory or exculpatory evidence. The materiality of the misrepresentations could also be highly probative of an intent to obtain immigration benefits. In short, since factual determinations are inevitably ad hoc, the trial court should be given great flexibility in weighing and considering all of the evidence.

Of course, the trial court must evaluate the evidence in light of the applicable burden of proof. When the issue is whether an alien's false testimony should disqualify him from obtaining citizenship, the burden of proof is on the alien, and all doubts should be resolved against him. *Berenyi*, 385 U.S. at 636-637. On the other hand, when the issue is whether a naturalized citizen should be denaturalized because of his prior false testimony, the burden of proof is on the government, and the government's evidence must be clear, unequivocal, and convincing, and not leave "the issue in doubt." *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

C. The Determination Whether "False Testimony" Has Been Given "For The Purpose Of Obtaining Any Benefits Under This Chapter" Is Partly One of Fact And Partly One Of Law

Under Section 1101(f)(6), the court must determine whether the testimony in question was false. Moreover, it must decide whether the applicant gave the false testimony with the intent to obtain immigration benefits. Those inquiries involve purely factual issues. See generally *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace."); *Berenyi*, 385 U.S. at 634-635. The court must also determine whether in fact "testimony" is involved. When a dispute arises whether a particular statement constitutes "testimony," the issue is one of law.

If Section 1101(f)(6) requires that the false testimony be material, it is our view that the issue of materiality is one of law. Most courts have so held in the perjury context,¹³ and there is no reason for a different approach here.

¹³ See, e.g., *Russell v. United States*, 369 U.S. 749, 755-756 (1962); *Sinclair v. United States*, 279 U.S. 263, 298 (1929) ("the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court"); *United States v. Corsino*, 812 F.2d 26, 30-31 (1st Cir. 1987); *United States v. Greber*, 760 F.2d 68, 69 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985); *United States v. Bridges*, 717 F.2d 1444, 1448 & n.18 (D.C. Cir. 1983) (citing cases for what court characterized as the "unanimous verdict of the federal courts"), cert. denied, 465 U.S. 1036 (1984); *United States v. Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980); *United States v. Richardson*, 596 F.2d 157, 165 (6th Cir. 1979); but see *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981) (stating that materiality is fact question for jury), cert. denied, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) (same).

**II. THE OVERALL APPROACH TO MATERIALITY IN
CHAUNT v. UNITED STATES IS CORRECT, BUT
THE STANDARD ADOPTED IN THAT CASE
SHOULD BE SIMPLIFIED**

**A. The *Chaunt* Court Correctly Concluded That The
Government Is Not Required To Prove An Ultimate
Disqualifying Fact In Order To Establish Material-
ity**

The leading case on materiality under the misrepresentation clause of Section 1451(a) is *Chaunt v. United States*, 364 U.S. 350 (1960). In *Chaunt*, the Court concluded that the naturalized citizen's nondisclosures were not material because the government had failed to show "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (*id.* at 355). As we have previously explained (Gov't Br. 20-21), it is our submission that the Court in *Chaunt* established two alternative tests for determining the materiality of misrepresentations or concealments, and that proof of disqualifying facts is not required under the second test.

1. Prior to *Chaunt*, it was well established that proof of an ultimate disqualifying fact was not required to establish the materiality of a false statement under the misrepresentation clause of Section 1451(a). See, e.g., *United States v. Montalbano*, 236 F.2d 757, 759-760 (3d Cir.), cert. denied, 352 U.S. 952 (1956); *Corrado v. United States*, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956);

Granduze y Marino v. Murff, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 330 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *United States v. Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States v. Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955), *aff'd*, 232 F.2d 216 (9th Cir. 1956). The Court in *Chaunt* did not state or imply that it intended to depart from this established line of cases. To the contrary, the language used by the Court in *Chaunt* is fully consistent with the prior authority.¹³ The Court's reference to whether the true facts "might" have been useful in an investigation "possibly" leading to the discovery of disqualifying facts (364 U.S. at 355) strongly suggests that proof of an ultimate disqualifying fact is not required.¹⁴ Cf. *Costello v. United States*, 365 U.S. 265, 270 (1961) (emphasis added) (upholding denaturalization of a person who concealed occupation as a bootlegger on the ground that "[i]n 1925 a known bootlegger would *probably* not have been admitted to citizenship"). Indeed, most of the lower court decisions since *Chaunt* have agreed with us that, under the *Chaunt* materiality standard, the government need not establish an ultimate disqualifying fact in order

¹³ The Court's statement of the materiality test was articulated, without elaboration, in a single sentence at the conclusion of its analysis of why *Chaunt's* misstatements were not material (364 U.S. at 354). We do not believe that the Court would have rejected, in such a casual and offhand manner, the approach consistently employed by lower courts throughout the country.

¹⁴ Petitioner himself appears to concede (Pet. 8; Oral Arg. Tr. 4) that the literal language of *Chaunt* supports the government's position.

for a misrepresentation to be material. See, *e.g.*, *United States v. Palciauskas*, 734 F.2d 625 (11th Cir. 1984); *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984); *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966); *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.), cert. denied, 375 U.S. 833 (1963); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). Contra, *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983); see also *La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974).

2. Petitioner's view—that the government must establish an ultimate disqualifying fact under either *Chaunt* test (Pet. Br. 9-20)—is contrary to the language, history, and purposes of 8 U.S.C. 1451(a), as we have previously explained (Gov't Br. 23-28). By requiring proof of an ultimate disqualifying fact, petitioner's standard in essence requires proof of illegal procurement in every denaturalization case. Thus, even though illegal procurement and misrepresentation are separate and distinct grounds for revoking citizenship, petitioner's approach would render the misrepresentation portion of Section 1451(a) wholly redundant. It is highly unlikely that Congress would have drafted the statute with two disqualification provisions if it had intended only one of them to have any effect.

Moreover, under petitioner's approach to materiality, the Court would be forced to disregard the well-accepted meaning of the term "material," in violation of the principle that when Congress does not define a statutory term, that term should be given its ordinary meaning. See, *e.g.*, *NLRB v. Amaz Coal Co.*, 453 U.S. 322, 329 (1981). In various other areas of law, the concept of materiality has been ap-

plied in a manner consistent with the literal language of *Chaunt*.

For instance, as we have noted, the perjury and false statement statutes do not require proof of an ultimate disqualifying fact, but instead require only that the government show that the statement had a natural tendency to influence, or was capable of influencing, the tribunal or government official. Similarly, in the securities field, a fact omitted from a proxy statement is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The securities materiality standard "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote" (*ibid.*). See also Note, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 Fordham L. Rev. 471, 479-480 & nn.67-70 (1980) (citing authorities in contract and tort law for the proposition that materiality does not require that the injured party's decision would have been altered, but only that the true fact would have been important to the decisionmaking process). Absent some indication by Congress of an intent to adopt a different materiality standard here—and we have found none—there is no basis for petitioner's proposed standard, which requires that the Court disregard the well-settled meaning of materiality in other contexts.

Finally, as we have explained (Gov't Br. 22-23), a requirement that the government establish an ultimate disqualifying fact would have serious adverse policy implications. An applicant for a visa or for citizenship would have every incentive to lie whenever he believed that the truth might affect his appli-

cation. Even if his lie were eventually discovered, which it might not be, the applicant would be better off because (1) the passage of time makes it more difficult for the government to establish an ultimate disqualifying fact, and (2) the burden shifts from the applicant (to prove eligibility for citizenship) to the government (to establish ineligibility by clear, unequivocal, and convincing evidence). As this Court recognized in *Chaunt* (364 U.S. at 352), "[f]ull and truthful response to all relevant questions required by the naturalization procedure is * * * to be exacted, and temporizing with the truth must be vigorously discouraged." Petitioner's proposed standard would defeat this important objective by inviting deceit.

In sum, this Court should reaffirm its conclusion in *Chaunt* that the government need not prove an ultimate disqualifying fact in order to establish materiality.

B. The Court Should Simplify The Materiality Standard Announced In *Chaunt* By Adopting The Standard Applicable In Perjury And False Statement Cases

1. While we submit that the Court in *Chaunt* was correct in not requiring the government to prove an ultimate disqualifying fact, we also believe that the Court's formulation of the materiality test has led to unnecessary confusion. Under our reading of the second *Chaunt* test, materiality is established if the government can show that, if the truth had been revealed, there *would* have been an investigation that *might* have uncovered disqualifying facts. See Gov't Br. 20-22; *Fedorenko*, 449 U.S. at 528 (White, J., dissenting) (stating that the "would/might" test is the proper one); *United States v. Fedorenko*, 597

F.2d 946 (5th Cir. 1979) (same), aff'd on other grounds, 449 U.S. 490 (1981); *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.) (same), cert. denied, 375 U.S. 833 (1963); see also 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 20.4b, at 20-14 (1986) (interpreting *Chaunt* as adopting a "would/might" test); Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed. B.J. 267, 271-272 (1962) (same). Other courts, however, have reached different conclusions. Thus, the court below construed *Chaunt* to require a showing that there would have been an investigation that "probably would have led to the discovery of disqualifying facts" (Pet. App. 22a (emphasis in original)).¹⁵ The standard applied by the court below had previously been adopted by the Second Circuit in the deportation context. See *Maikovskis v. INS*, 773 F.2d 435, 442 (1985), cert. denied, No. 85-1483 (June 16, 1986). The Sixth Circuit has adopted a "might/might" standard, i.e., whether disclosure of the true facts "might have led to further action and the discovery of facts which would have justified the refusal of the visa." *Kassab v. INS*, 364 F.2d 806, 807 (1966) (emphasis in original; citations omitted). In the Tenth Circuit, the test is whether there *would* have been an investigation that *would* have led to the discovery of a disqualifying

¹⁵ The court left open the question "whether the materiality test under *Chaunt* is satisfied under the *possibly* standard, i.e., whether the government need only show that the truth at the time of the application would have prompted an investigation and that such investigation would have *possibly* revealed the facts which would have made the applicant ineligible" (Pet. App. 22a (emphasis in original)).

fact. *United States v. Sheshtaw*, 714 F.2d 1038, 1040-1041 (1983).¹⁶

These various tests all represent efforts to interpret the materiality language used by the Court in *Chaunt*. While the approaches differ significantly, none of them has the virtue of simplicity. Rather, under any of these interpretations, the denaturalization court is still forced to apply two distinct tests and, under the second test, to consider two separate issues.

As we suggested at oral argument (Oral Arg. Tr. 48-49), this Court could eliminate the confusion arising from *Chaunt* by substituting for the two-part formulation the test that is applied in perjury and false statement cases, *i.e.*, whether the false statement had a natural tendency to influence, or was capable of influencing, the tribunal or governmental official.¹⁷ This test has proved workable and easy to apply. It would substitute one simple inquiry for the multiple issues that must be resolved under the *Chaunt* formulation. Furthermore, the criminal standard is more faithful to Congress's intent. Since Congress did not define materiality, it is more in

¹⁶ The three Justices in *Fedorenko* who offered their views on *Chaunt* gave three different interpretations of the materiality test. See Gov't Br. 21 n.21 (describing positions taken by Justices Blackmun, Stevens, and White).

¹⁷ A similar approach was recently taken by the Eleventh Circuit in the context of a forfeiture proceeding based on visa fraud. See *United States v. One Lear Jet*, 808 F.2d 765, 772-773 (1987) ("misrepresentations are material if they could have had a significant impact on the decision making process of the immigration official authorized to grant or deny the visa"), petition for cert. pending, No. 86-1725.

keeping with Congress's intent to look to the settled meaning of the term rather than to formulate a new, multi-layered definition, as the Court did in *Chaunt*.

This Court would not need to overrule *Chaunt* in order to adopt the criminal standard. While the two standards are characterized in different terms, they are not fundamentally different. Both focus principal attention on whether the information would be important to the decisionmaker. And neither one requires proof of an ultimate disqualifying fact. Although the criminal standard does not refer explicitly to the ultimate disposition of the inquiry in question, a fact ordinarily would not be capable of influencing a decisionmaker unless it related, at least indirectly, to an applicant's qualifications for a visa or citizenship.

To the extent that the *Chaunt* test, as applied by lower courts, would in some cases yield different outcomes than would the perjury materiality standard, we do not believe that that result was intended by Congress or by the *Chaunt* Court itself. As we understand *Chaunt*, this Court did not mean to redefine materiality to give it a special and distinct meaning in denaturalization cases. Rather, the Court appears simply to have been applying existing materiality concepts, while using language applicable to the immigration and naturalization context. There is certainly no basis in *Chaunt* for the conclusion that the Court intended to adopt a more exacting materiality standard for denaturalization cases than for criminal cases.

2. Our submission that the Court should adopt the criminal standard also resolves the Court's question whether the issue of materiality is one of fact or

law. As we noted above, in the perjury and false statement context it is well established that the issue of materiality is one of law.¹⁸

III. THE REQUIREMENT THAT CITIZENSHIP BE "PROCURED BY" A MATERIAL MISREPRESENTATION UNDER SECTION 1451(a) SIMPLY MAKES CLEAR THAT THE MISREPRESENTATION MUST HAVE BEEN MADE IN THE COURSE OF THE VISA OR NATURALIZATION PROCEEDINGS

In addition to authorizing denaturalization for illegal procurement, Section 1451(a) also provides for the denaturalization of any person whose citizenship was "procured by concealment of a material fact or by willful misrepresentation * * *." In our view, the phrase "procured by" in the statute is intended only to draw a connection between the misstatement and the application for naturalization. Naturalization is "procured by" a misrepresentation if the applicant successfully obtains his naturalization as the result of an application process in which he made material misrepresentations.¹⁹ Congress could have

¹⁸ As we explained above, the government's evidence established materiality under the criminal standard. Moreover, while we believe that the criminal standard would be easier to administer, we continue to submit that the government's evidence was sufficient under any of the existing *Chaunt* formulations (see Gov't Br. 29-45).

¹⁹ The concept of "procuring" citizenship is not new to the current statute. It first appeared in the Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601, which authorized federal prosecutors to institute denaturalization proceedings on the ground of fraud or illegal procurement and provided that "the party holding the certificate of citizenship alleged to have been *fraudulently or illegally procured* shall have sixty days personal notice in which to make answer * * *" (emphasis added). See also Nationality Act of 1940, ch. 876, § 340, 54 Stat. 1160

provided for the denaturalization of anyone who "obtained citizenship after concealing a material fact or making a willful misrepresentation in the process of procuring a visa or citizenship." It chose the shorter, albeit less precise, formulation now embodied in the statute, but the meaning is the same: the material misstatements or concealments must have been made during the process of applying for a visa or naturalization.

It is possible to argue that the phrase "procured by," when viewed in isolation, imposes a "but for" test of causation whereby denaturalization is authorized only if the applicant definitely would have been denied citizenship had the true facts been disclosed. To our knowledge, however, no court has adopted such an interpretation of that phrase,²⁰ and we submit that such a reading would be erroneous.

Interpreting the phrase "procured by" as establishing a "but for" requirement of causation would make several important portions of Section 1451(a) redundant, including the very clause in which the

(Commissioner of Immigration and Naturalization authorized to cancel any certificate of citizenship that was "illegally or fraudulently obtained").

²⁰ Even the Tenth Circuit in *Sheshtawy*, which held that proof of an ultimate disqualifying fact is required, did not rely on the "procured by" language; it relied instead on *Chaunt* and the concept of materiality (see 714 F.2d 1039-1041).

In *Chaunt*, the petitioner relied on the "procured by" language and argued that "[t]he concealment or misrepresentation, therefore, must have made the difference between obtaining naturalization and not obtaining it" (*Chaunt* Br. 11). This Court did not address that argument in its opinion, and instead resolved the case on the narrower ground of materiality.

words appear. Moreover, it would seriously impair the objective of obtaining true information from citizenship applicants. The ramifications are so far-reaching that the interpretation cannot be the one that Congress intended.

If "procured by" meant "caused by," the word "material" in Section 1451(a) would be redundant. That is, if citizenship would not have been awarded had the true facts been known, then the misrepresentation or concealment is material under any conceivable definition.²¹ Under such an interpretation, there would have been no need for Congress to use the word "material" in the misrepresentation clause of Section 1451(a).

In addition, reading the words "procured by" as establishing a "but for" requirement would render the entire misrepresentation clause of Section 1451(a) unnecessary, since the other part of that section, which deals with "illegal procurement," would be dispositive in every case in which the requirements of the misrepresentation clause could be satisfied. Put another way, interpreting "procured by" as requiring causation would compel the government to prove illegal procurement in every case. Congress could not have intended, through the use of the phrase "procured by," to render the entire misrepresentation clause of Section 1451(a) meaningless.

Furthermore, reading "procured by" as a requirement of causation would make Section 1451(a) a license to lie rather than a deterrent against dishon-

²¹ Indeed, a "but for" requirement would go beyond proof of an ultimate disqualifying fact. The government would also have to show that it would have realized that the facts were disqualifying at the time and that it would have acted upon those facts to disqualify the applicant.

esty. If an applicant can be denaturalized only for false statements that would necessarily have caused his rejection in the first instance, he has no incentive to tell the truth. The applicant cannot be worse off for making misstatements or concealing facts if he can be denaturalized only if he would have been denied citizenship had he told the truth. As we explained above, if the government must prove an ultimate disqualifying fact, an applicant will have an affirmative incentive to lie.

In sum, the interpretation of "procured by" as a "but for" requirement of causation would lead to absurd results. Important parts of Section 1451(a) would be redundant, and the purpose and function of the misrepresentation clause of Section 1451(a) would be negated. For those reasons, it is not surprising that apparently no court has construed the phrase "procured by" to incorporate a "but for" causation requirement. In response to the Court's question, we submit therefore that, when a misrepresentation has been established as "material" within the meaning of 8 U.S.C. 1451(a), the government can show that citizenship was "procured by" that misrepresentation if it shows that the material misrepresentation was made as part of the process leading to the obtaining of citizenship.

CONCLUSION

For the foregoing reasons and those stated in our initial brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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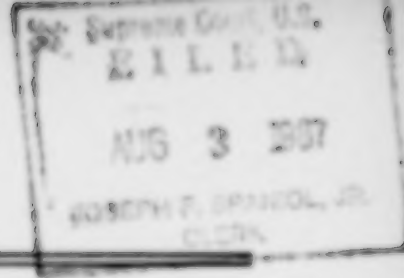
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AUGUST 1987

14
No. 86-228



In The
Supreme Court of the United States
October Term, 1987

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**SUPPLEMENTAL BRIEF OF PETITIONER
ON REARGUMENT**

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**QUESTIONS PRESENTED
BY THIS COURT'S ORDER OF JUNE 26, 1987**

1. Whether petitioner is subject to denaturalization for want of good moral character under 8 U.S.C. Sections 1451(a), 1427(a), and 1101(f)(6), with particular attention to

(a) whether the "false testimony" provision of 8 U.S.C. Section 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

(b) what standards should govern the determination under 8 U.S.C. Section 1101(f)(6) whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter . . ."; and

(c) whether the latter determination is one of law or fact?

2. (a) Should the materiality standard articulated in *Chaunt v. United States*, 364 U.S. 350 (1960), be abandoned and, if so, what standard should govern the materiality inquiry under 8 U.S.C. Section 1451(a); and

(b) is the determination of materiality under 8 U.S.C. Section 1451(a) one of law or fact?

3. When a misrepresentation has been established as "material" within the meaning of 8 U.S.C. Section 1451(a), must any further showing be made to establish that citizenship was "procured by" that misrepresentation?

TABLE OF CONTENTS

Page

Questions Presented by This Court's Order of June 26, 1987	i
Table of Contents	ii
Table of Authorities	iv
Preliminary Statement	1
Summary of Argument	6
Argument	8
I. Petitioner Is Not Subject To Denaturalization For Want Of Good Moral Character	8
A. The Definition Of Want Of Good Moral Character Under 8 U.S.C. § 1101(f)(6), In Addition To False Testimony, Requires A Showing That It Was For The Purpose Of Obtaining An Immigration Benefit, Which Is The Functional Equivalent Of A Material- ity Requirement	9
B. In Order To Denaturalize There Must Be Clear, Unequivocal And Convincing Proof That Citizenship Was Procured By Giving False Testimony With Respect To a Material Fact.	10
C. "For the Purpose Of Obtaining Any Bene- fits" Is An Additional Legal Requirement Before Naturalization Can Be Precluded.	13
II. This Court Should Clarify That The Holding Of <i>Chaunt</i> Precludes A Mere Possibility Or Probability Standard.	15
A. Clear, Unequivocal and Convincing Proof Of The Actual Existence Of An Ultimate Dis- qualifying Fact Should Be The Standard Governing The Materiality Inquiry Under 8 U.S.C. § 1451(a).	20

TABLE OF CONTENTS—Continued

	Page
B. The District Court's Determination Of The Materiality Inquiry Under 8 U.S.C. § 1451(a) Is A Finding of Fact Subject To Review Only Under The Clearly Erroneous Standard Of Rule 52(a) Of The Federal Rules Of Civil Procedure.	23
III. The Requirement Of Section 1451(a) That There Can Be No Denaturalization For A Misrepresentation Or Concealment Of A "Material Fact" Unless Naturalization Was "Procured By" Such Fact Indicates The Government Must Prove That A Disqualifying Fact Actually Existed.	26
Conclusion	42

TABLE OF AUTHORITIES

Page

CASES

<i>Atlantic Mutual Ins. Co. v. Lavino Shipping Co.</i> , 441 F.2d 473 (3rd Cir. 1971)	40
<i>Anderson v. Liberty Lobby, Inc.</i> , 475 U.S. —, 91 L.Ed.2d 202 (1986)	20, 28
<i>Berenyi v. INS</i> , 385 U.S. 630 (1967)	10
<i>Caldwell v. Craighead</i> , 432 F.2d 213 (C.A. 6, 1970) cert. denied, 402 U.S. 953 (1971)	40
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960)	passim
<i>Costello v. United States</i> , 365 U.S. 265 (1961)	9
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981)	passim
<i>Icicle Seafoods, Inc. v. Worthington</i> , 475 U.S. —, 106 S.Ct. 1527 (1986)	6, 24, 25, 34, 36, 38
<i>In re Haniatakis</i> , 376 F.2d 728 (C.A. 3, 1967)	9
<i>Klopprott v. United States</i> , 335 U.S. 601 (1948)	10, 30, 31
<i>Krasnov v. Dinan</i> , 465 F.2d 1298 (C.A. 3, 1972)	38
<i>Maikovskis v. INS</i> , 773 F.2d 435 (C.A. 2, 1985), cert. denied, 106 S.Ct. 2915 (1986)	8, 41
<i>Multi-Medical Convalescent v. NLRB</i> , 550 F.2d 974 (C.A. 4, 1977)	40
<i>Plummer v. Western Intern. Hotels Co., Inc.</i> , 656 F.2d 502 (C.A. 9, 1981)	40
<i>Pollard v. Met. Life Ins. Co.</i> , 598 F.2d 1284 (C.A. 3, 1979), cert. denied, 444 U.S. 917, reh. denied, 444 U.S. 985 (1977)	40
<i>Pullman-Standard v. Swint</i> , 465 U.S. 273 (1982)	26
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943)	17, 21, 29, 34
<i>Teate v. United States</i> , 297 F.2d 120 (C.A. 5, 1961)	41

TABLE OF AUTHORITIES—Continued

	Page
<i>United States ex rel. Iorio v. Day</i> , 34 F.2d 920 (C.A. 2, 1929)	14
<i>United States ex rel. Tepper v. Miller</i> , 87 F.Supp. 285 (S.D.N.Y. 1949)	14, 32
<i>United States v. Kowalchuk</i> , 571 F.Supp. 72 (E.D. Pa. 1983) <i>aff'd</i> , 773 F.2d 448 (C.A. 3, 1985), <i>cert. denied</i> , 106 S.Ct. 1188 (1986)	17, 41
<i>United States v. Linnas</i> , 527 F.Supp. 427 (E.D.N.Y. 1981) <i>aff'd</i> 685 F.2d 427 (C.A. 2, 1982)	41
<i>United States v. Lopez</i> , 543 F.2d 1156 (C.A. 5, 1976), <i>cert. denied</i> , 429 U.S. 1111 (1977)	40
<i>United States v. Nicholson</i> , 492 F.2d 124 (C.A. 5, 1974)	40
<i>United States v. Osidach</i> , 513 F.Supp. 51 (E.D.Pa. 1981)	41
<i>United States v. Riela</i> , 337 F.2d 986 (C.A. 3, 1964)	11
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (C.A. 10, 1983)	8

STATUTES

Immigration Act of 1924, Pub.L. No. 68-139, Ch. 190, 43 Stat. 153, <i>et seq.</i>	3, 12, 16, 33
Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 <i>et seq.</i>	11, 19
8 U.S.C. § 746 (Repealed June 27, 1952)	13
8 U.S.C. § 1101(f)(6)	9, 11, 21, 31
8 U.S.C. § 1427(a)	9, 13, 31
8 U.S.C. § 1451(a)	5, 7, 13, 20, 21, 23, 26
18 U.S.C. § 1001	29, 30

TABLE OF AUTHORITIES—Continued

	Page
18 U.S.C. § 1621	29, 30
18 U.S.C. § 1623	29, 30

RULES AND REGULATIONS

Federal Register, December 24, 1945,

22 C.F.R. § 61.250	1
22 C.F.R. § 61.320, Note 138	2
22 C.F.R. § 61.346(c)	33
Federal Rules of Civil Procedure, Rule 52(a)	23, 25, 34
Federal Rules of Evidence, Rule 105	41

OTHER AUTHORITIES

Displaced Persons in Europe, Report No. 950, U.S. Senate Committee on the Judiciary	36
Presidential Directive, Dec. 22, 1945	5

PRELIMINARY STATEMENT

The District Court found, and as was conceded by the petitioner, that he misrepresented his date of birth as October 4, 1913 (instead of September 21, 1915) and his place of birth as Kaunas (instead of Reistru) in his January 9, 1947 Application for Immigration Visa (Quota), and that he repeated the same misrepresentations in his October 23, 1953 Petition for Naturalization. (Pet.App.C, 118a-119a, J.A.30,48). At the time of his visa application, his correct age was 31 (instead of 33) and his actual place of birth was a rural town in Lithuania (instead of a city). He correctly disclosed in his visa application the name of the region or county of Taurage (in which the town of Reistru is located) where his parents resided. (J.A.30-31).

On March 4, 1948, petitioner received a non-preference, quota immigration visa, which had not expired at the time he applied for his Certificate of Arrival and Preliminary Form for a Declaration of Intention to become a citizen of the United States on May 29, 1948. (J.A.38-41). He neither sought nor obtained an age-related (unmarried child under 21 or dependant child under 18), marriage-related (spouse of U.S. Citizen), or job-related (skilled agriculturalist) preference. The sole basis for determining petitioner's eligibility for his quota immigration visa was his country of birth, which he correctly listed as Lithuania (J.A.30; 22 CFR § 61.250). Section 12(a) of the Immigration Act of 1924 provided in relevant part; "For purpose of this Act nationality shall be determined by country of birth . . .". See also 22 CFR § 61.250, n.104 (Petitioner's Reply Brief Appendix, 4a-6a). Petitioner was not a member of any of the classes of persons then excludable under

the immigration laws, which the regulations then promulgated thereunder specifically stated "are listed in the application". (22 CFR § 61.320 n.138, Petitioner's Reply Brief Appendix, 7a-8a).

The District Court found that petitioner could not have received any benefit "by placing his birth in Kaunas rather than Reistru and by dating his birth October 4, 1913 rather than September 21, 1915". (Pet.App.C, 118a-119a). The District Court further found that petitioner "continued to use his own name" and thus misstating his date and place of birth could not "insulate" him "from charges of war crimes" (Ibid). The District Court also found that, "There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever" on his receiving his visa since had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued." (Pet.App.C, 119a).

The Amended Complaint alleges that petitioner also misrepresented in his visa application and in his Alien Registration Form, his "true occupation during the period 1942-1944" (J.A.7,18). But, the petitioner's Application for Immigration Visa did not even ask for wartime occupations. The only space to be filled in as to occupation calls for a statement to be made in the present tense only, "That my calling or occupation is", to which the petitioner correctly answered "dental technician" (J.A.30). In part 9 of the Alien Registration form petitioner also correctly listed his "usual" and "present" occupation as dental technician (J.A.35). Part 10(a) inquired, "I intend to be engaged in the following activities in the United States", to which petitioner answered "unknown". In Part 10(b) the

form seeks further information about the alien's prior "activities" by inquiring, "I have been within the past 5 years, engaged in the following activities", with respect to which petitioner on January 9, 1947 correctly listed his activities in Germany as "student, dental technician, farmer and forestry work" (J.A.35). The only activity omitted from that form was his job as a clerk-bookkeeper in a brush and broom shop in Kaunas, Lithuania. Petitioner at that time submitted to Vice Counsel Frank K. Schilling his internal Lithuanian passport or identification card, dated March 26, 1944, which the Consulate's own translation shows disclosed "Occupation Office-worker" (J.A.28). The District Court found that even Seymour Finger (the former Vice Consul who testified as the Government's witness and whom the Government selected instead of Frank K. Schilling, the Vice Consul who actually processed petitioner's visa application) "would not have denied a visa even to a manager of a 15 employee brush and broom factory . . ." (Pet.App.C, 119a). The Third Circuit agreed with the District Court's finding that the alleged omission of petitioner's wartime occupation in Lithuania was not "material" (Pet.App.A, 35a).

The Amended Complaint also alleges that petitioner misrepresented his residence in Telsiai and concealed his wartime residence in Kedainiai during the period 1940-1942 (J.A.7,13,18). The District Court found that "both sides agree" petitioner "again entered Telsiai Seminary" in mid October 1941 (Pet.App.C, 111a). The record also contains, as a Government Exhibit, the Certification of the Seminary of Telsiai that petitioner was a student in Telsiai in 1941 (J.A.51-52). Whereas the visa application seeks a listing of all residences from the age of 14, Section 7(b) of the Immigration Act of 1924 required a listing of residences for

only 5 years preceding the visa application, or here back to January 1942, all of which were correctly listed as to petitioner. Neither the declaration of intention, nor the application for, nor petition for citizenship requests wartime residence (J.A.38-50). The District Court found that Seymour Finger, the Government's own witness, "testified that disclosure of a residence in Kedainiai in 1941 would not have raised any questions in his mind" and noted that petitioner's wife's visa "listed her birth place and residence in Kedainiai". (Pet.App.C, 119a). Petitioner also listed his wife's birth place as Kedainiaj in his visa application in the space immediately below the one in which was squeezed the list of seven residences he had from the age of 14 (J.A.30).

The District Court found that the omission of petitioner's residence in Kedainiai in the summer of 1941 was not material and that if disclosed would not have triggered an investigation and "would not have raised any question" even in Seymour Finger's mind as to whether petitioner had engaged in any atrocities (Pet.App.C, 119a). The Third Circuit agreed with the District Court on this issue and held, "... because there is no hard evidence in the record that the consulate officials in Stuttgart had knowledge of these particular atrocities at the time defendant applied for his visa, and the government accordingly did not prove that knowledge of the defendant's residence would have prompted an investigation, we cannot conclude that this concealment alone was material under the second prong of *Chauvet*" (Pet.App.A, 35a).

The Third Circuit also agreed with the District Court that (1) the government had failed to establish "that facts were suppressed which, if known, would have warranted denial of citizenship" (Pet.App.A, 20a); and (2) "that the

Chaunt materiality test is invoked when the government attempts to denaturalize a citizen based on the false testimony provisions of section 1101(f)(6)". (Pet.App.A, 27a).

The Third Circuit, however, then proceeded from the false premise that the absence of being a victim of Nazi persecution was a disqualifying fact that precluded petitioner from obtaining a valid visa to the false conclusion that such status somehow transformed his immaterial representations as to his date and place of birth into material misrepresentations under section 1451(a). In reaching that false conclusion of materiality, the Third Circuit ignored the District Court's explicit finding that Seymour Finger's testimony claiming that such a regulation then existed was "in error" (Pet.App.C, 120a n.7); and sidestepped the actual regulation in effect as to displaced persons covered by the Presidential Directive of December 22, 1945 (Pet. App.A, 33a n.10). The Third Circuit compounded its errors by making a *de novo* factual inference in favor of the Government that disclosure of petitioner's true date and place of birth would have triggered off an investigation that would have led to an examination of his having obtained a residence permit in pre-Allied Germany, from which a further inference was drawn that he was not a victim of Nazi persecution (Pet.App.A, 32a-33a). The Third Circuit's flawed review of the record failed to take into consideration the fact that petitioner had fully disclosed all of his residences in Germany, and that his visa application noted "Police dossier available", (J.A.30,33), neither of which served to trigger any investigation to determine if there were any "discrepancies" as to his date and place of birth in the German municipal records.

As the District Court correctly found, the truthful disclosure of petitioner's date and place of birth would not

have resulted in an investigation and would have had no effect whatsoever on petitioner's eligibility for a visa or citizenship. None of those District Court findings was "clearly erroneous" or was declared "clearly erroneous" by the Third Circuit. Each of those findings by the District Court was "unassailable." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. —, 106 S.Ct. 1527 (1986).

SUMMARY OF ARGUMENT

Section 1451 of the Immigration and Nationality Act ("INA") is the only provision of that Act governing denaturalization. Section 1451(a), the relevant part of that statute as to petitioner, requires that, before there can be denaturalization, naturalization must have been "procured by concealment of a material fact or by willful misrepresentation [of a material fact]." False swearing alone does not end the materiality inquiry when denaturalization is at stake. The materiality inquiry must be made under the denaturalization statute alone, since "In view of petitioner's status as a United States citizen, it is unnecessary to consider here the question of materiality at the naturalization stage." *Fedorenko v. United States*, 449 U.S. 490, 520 (1981).

The holding by this Court in *Chaunt v. United States*, 364 U.S. 350, 354-355 (1960), is that the denaturalization statute requires that, before a citizen can be denaturalized, there must be clear, unequivocal and convincing evidence which does not leave any doubt that "facts were suppressed which, if known, would have warranted denial of citizen-

ship." It is clear from the application of that holding by this Court that not every omitted or even intentionally suppressed fact would amount to a disqualifying fact warranting revocation of citizenship. This court should clarify or abandon the *dicta* in *Chaust*, which sets forth two ambiguous formulations of an alternative approach to proving materiality, on the basis of the experience of this case where that "second prong" led an appellate court to engage in a tenuous line of reasoning to an hypothesized, but non-existent, visa eligibility requirement.

A materiality inquiry that would be satisfied by a diluted standard of proof of a mere "possibility" or "probability" would be in contradiction to the "firmly entrenched" denaturalization evidentiary standard, which requires clear, unequivocal and convincing evidence which does not leave any issue in doubt. That denaturalization evidentiary standard announced by this court in 1943, preceded and survived the revisions of Section 1451(a) in 1952 and is thus part of the substantive law of denaturalization.

The materiality inquiry rests on the substantive law of the denaturalization statute which governs which facts are critical to it and which are irrelevant. The legal element "procured by" in the denaturalization statute gives context to and limits the scope of the "material fact" requirement. Section 1451(a) is unambiguous in requiring that, before there can be denaturalization, naturalized citizenship must have been "procured by" the immigrant having concealed or misrepresented a "material fact." In the context of the denaturalization statute, "material fact" requires that, as a clear and unequivocal result of a fact being suppressed or misrepresented, citizenship, for which the immigrant was not otherwise eligible, was "procured." Thus,

a "material fact" has to be a fact which is controlling or outcome determinative, not merely "probably" or "possibly" of interest.

When the District Court "unassailably" found that had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet.App.C, 119a), it clearly meant that petitioner's citizenship could not have been "procured by" any of his misrepresentations or concealments.

ARGUMENT

I. PETITIONER IS NOT SUBJECT TO DENATURALIZATION FOR WANT OF GOOD MORAL CHARACTER

Section 1451 of the Immigration and Nationality Act ("INA") is the only provision of that Act governing proceedings to revoke naturalization. The relevant part of that statute requires that before there can be denaturalization, the naturalization must have been "procured by concealment of a material fact or by willful misrepresentation". 8 U.S.C. § 1451(a). Both the District Court (Pet. App.C, 123a) and the Third Circuit Court of Appeals in the instant case (Pet.App.A, 8a, 25a-28a), as well as the Tenth Circuit Court of Appeals in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (C.A. 10, 1983), rejected the Government's attempt under Section 1101(f)(6) of INA to avoid the statutory requirement of materiality of a misrepresentation or factual concealment in a denaturalization proceeding. See also, *Maikovskis v. INS*, 773 F.2d 435, 440-

41 (C.A. 2, 1985), *cert. denied*, 106 S.Ct. 2913 (1986); and *In re Haniatakis*, 376 F.2d 728, 731 (C.A. 3, 1967). False swearing alone does not end this Court's "materiality inquiry" when denaturalization is at stake. *Fedorenko v. United States*, 449 U.S. 490, 507-508 (1981); See also, *Castello v. United States*, 365 U.S. 265, 271-272 n.3 (1961).

A. The Definition Of Want Of Good Moral Character Under 8 U.S.C. § 1101(f)(6), In Addition To False Testimony, Requires A Showing That It Was For The Purpose Of Obtaining An Immigration Benefit, Which Is The Functional Equivalent Of A Materiality Requirement.

Section 1101(f)(6) is part of the "Definitions" section of the INA. While the Definitions section does not define "materiality", its defined terms indicate that more than the giving of false testimony is required before there can be a finding of a lack of good moral character. Such false testimony must have been given "for the purpose of obtaining any benefits under this Chapter." Thus, not every false statement or false testimony *per se* constitutes lack of good moral character for purposes of the immigration laws. It is only that false testimony whose purpose is to obtain benefits under the immigration laws, unavailable to the applicant but for the false testimony, which precludes a finding of good moral character at the prenaturation stage of citizenship. That additional "purpose" requirement is at least the functional equivalent of requiring that the false testimony concern a fact material to obtaining an immigration benefit.

The defined phrase "good moral character" appears substantively only in Section 1427(a), and it appears there

as one of the "Requirements of naturalization," as distinct from a ground for denaturalization. *Berezy v. INS*, 385 U.S. 630, 636 (1967). See also, concurring opinion of Justice Blackmun in *Fedorenko v. United States*, 449 U.S. 490, 520 n.3 (1981). That section expressly provides that, "No person . . . shall be naturalized unless such petitioner . . . (3) during the period referred to in this subsection [the five years immediately preceding the date of filing of the petition for naturalization] has been and still is a person of good moral character . . .". But, lack of good moral character is not one of the stated statutory grounds for denaturalization. Nor could it constitutionally be a ground for revoking citizenship once granted, for otherwise we would have two classes of citizenship, in which only naturalized citizens would be subject to loss of their citizenship based upon a finding of lack of good moral character for engaging in false swearing; whereas native born citizens would be subject only to fine and imprisonment. See *Klapprott v. United States*, 335 U.S. 601, 619 (1949).

B. In Order To Denaturalize There Must Be Clear, Unequivocal And Convincing Proof That Citizenship Was Procured By False Testimony With Respect To A Material Fact.

Petitioner's Application for an Immigration Visa (J.A. 32) indicated he would be subject to fine and imprisonment if he obtained entry into the United States "by a willful false or misleading representation or willful concealment of a material fact". There was no warning or any notice that subsequently obtained citizenship could be revoked on the basis of lack of good moral character for making any false statement. In Petitioner's Application to File Petition For Naturalization (J.A.42), he was put on notice

only that "Under the naturalization laws, citizenship may be revoked for concealment of a material fact or for willful misrepresentation in connection with the naturalization proceedings". No naturalized citizen has been forewarned that any false statement constitutes lack of good moral character for which his citizenship could be revoked.

When Congress enacted the Immigration and Nationality Act on June 27, 1952 it contained a Savings Clause, Section 405, which provided in pertinent part that,

"(a) *Nothing* contained in this Act (this Chapter), unless otherwise specifically provided therein, *shall be construed to affect the validity of any* declaration of intention, petition for naturalization, certificate of naturalization . . . or *other document* or proceeding *which shall be valid at the time this Act shall take effect*; . . . but as to all such . . . proceedings, statute (so in original; probably should read "statutes") conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act (this chapter) are, unless otherwise specifically provided therein, hereby continued in force and effect. *When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act (this chapter), makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa . . .*" 8 U.S.C. § 1101. (emphasis added). See also *United States v. Riela*, 337 F.2d 986, 989 (C.A. 3, 1964): "The legality of the defendant's naturalization must be determined under the applicable provisions of the statutes as they were at the time of his admission to citizenship".

Petitioner herein applied for a visa in January 1947 and received a non-preference, quota immigration visa on

March 4, 1948 that was valid under the Immigration Act of 1924 at the time of his lawful entry into the United States. Petitioner was not a member of any of the classes of persons listed as excludable on the visa application (J.A.31-32). Under Section 2(a) of the Immigration Act of 1924, it was required only that,

"Such visa shall specify (1) the nationality of the immigrant; (2) whether he is a quota immigrant (as defined in section 5) . . .; (3) the date on which the validity of the immigration visa shall expire; and (4) such additional information *necessary* to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed". Section 2(a), Immigration Act of 1924, Pub. L. No. 68-139, Ch. 190, 43 Stat. 153. (emphasis added).

Petitioner did not conceal or misrepresent any fact that was either "necessary" to the proper enforcement of the immigration laws or that had a "material" bearing on whether he would receive the "benefit" of a non-preference, quota immigration visa. Petitioner's visa was validly issued since his application correctly set forth his nationality as Lithuanian and correctly indicated he was a quota immigrant. The correctness of his age (31 instead of 33) was not "such additional information necessary to the proper enforcement of the immigration laws" since he did not seek or obtain an age-related preference. Incorrectly listing an urban location (Kaunas) as his place of birth in Lithuania instead of the rural area of Reistru, was additional information, but meaningless and hardly "necessary" to the proper enforcement of the immigration laws. Moreover, Section 7(b) of that Act required him to list places of residence only "for the five years immediately preceeding his application" (January 1942 to January

1947) and thus the listing of his residence in the summer of 1941 was not statutorily required for the valid issuance of a visa. Furthermore, Section 7(b) required him to list only his then "calling or occupation" which he correctly listed as dental technician. Thus, petitioner was "in possession of an unexpired immigrant visa", and he was not excludable under the Immigration Act of 1924 when he was admitted into the United States in 1948. He correctly disclosed such information as would have had a material bearing on whether to grant him a visa. Indeed, his misrepresentation of being born in a city tended to negate any skilled agricultural preference and his misrepresentation of being older eliminated any possible age related preference or "benefit."

As demonstrated *infra* at Points II and III, the standard which governs what false testimony can be the basis for denaturalization is that the Government must prove by clear, unequivocal and convincing evidence that citizenship was procured by misrepresenting or concealing the existence of a fact which would have ultimately disqualified the immigrant from citizenship.

C. "For The Purpose Of Obtaining Any Benefits" Is An Additional Legal Requirement Before Naturalization Can Be Precluded.

The making of a false statement under oath in immigration papers could have constituted a legal basis for being prosecuted for false swearing under 8 U.S.C. § 746 (prior to its repeal on June 27, 1952); and yet still not have constituted grounds for precluding naturalization under § 1427(a), let alone for now revoking citizenship under § 1451(a). Section 1427(a) of INA imposes the additional

legal requirement that the false testimony be given "for the purpose of obtaining any benefits under this Chapter". The clear implication is that the immigrant's purpose in lying must be to obtain an immigration benefit not otherwise available to him but for the lie.

At the time petitioner entered this country in 1948, the suppressed or misrepresented fact had to have been a ground for exclusion under the Immigration Act of 1924 in order to justify refusal of a visa or his exclusion upon entry. *United States ex rel. Teper v. Miller*, 87 F.Supp. 285 (S.D.N.Y. 1949). The leading case at that time was *United States ex rel. Iorio v. Day*, where the Second Circuit rejected the attempt to deport an alien, who had falsely sworn in his visa application that he had never been imprisoned, in stating, "It is true that the relator was bound to tell the truth on his application, but if what he suppressed was irrelevant to his admission, the mere suppression would not debar him". 34 F.2d 920, 921 (C.A.2, 1929).

After indicating, "I cannot understand what benefit defendant expected to achieve by placing his birth in Kaunas rather than Reistru and by dating his birth October 4, 1913 rather than September 21, 1915" (Pet.App.C, 118a-119a), the District Court herein made the express findings that "Ironically, it would appear that had defendant given the correct information in his visa application form, his visa nevertheless would have been issued. There is nothing to suggest his having been born on September 21, 1915 in Reistru would have had any effect whatsoever." *Id.* at 119a.

In any event, as pointed out by Justice Blackmun in *Fedorenko*, "In view of petitioner's status as a United

States citizen, it is unnecessary to consider here the question of materiality at the naturalization stage". 449 U.S. at 520 n.3. The proper inquiry as to materiality must be made under the denaturalization statute alone.

II. THIS COURT SHOULD CLARIFY THAT THE HOLDING OF CHAUNT PRECLUDES A MERE POSSIBILITY OR PROBABILITY STANDARD

The holding in *Chaunt v. United States*, 364 U.S. 350, 354-355 (1960) is that, before a citizen can be denaturalized, there must be clear, unequivocal and convincing evidence, which does not leave any doubt, that "facts were suppressed which, if known, would have warranted denial of citizenship". It is clear from the application of that standard of materiality by this Court that not every omitted or even intentionally suppressed fact would amount to a disqualifying fact warranting revocation of citizenship. *Fedorenko v. United States*, 449 U.S. 490, 507-508 (1981). Thus, although Chaunt intentionally suppressed certain arrests for distributing handbills and engaging in public demonstrations by denying he had ever been arrested, he did disclose that he was a member of the International Workers Order, which was said to be controlled by the Communist Party. The disclosure of that affiliation was of much greater significance as to whether he had the requisite intent to renounce foreign allegiance at the time he took the oath of citizenship, than the thwarting of the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations . . ." *Id.* at 355. There, this Court concluded that the failure to report the three arrests was "neutral" and that it would not "speculate" as to why they were not disclosed.

In the instant case, the petitioner accurately disclosed on his visa application each of his residences from January 1942 to January 1947, as was required by Section 7(b) of the Immigration Act of 1924. He also disclosed in his immigration papers that his wife was born in Kedainiai, his parents resided in Taurage, and that he had been a member of the Sauliai. None of those disclosures triggered off an investigation. Indeed, the Naturalization Examiner noted on the Petition for Naturalization "Investigation Waived." After a lengthy review of the record, the District Court expressly found that no investigation would have resulted had any of the suppressed facts been disclosed. (Pet.App.C, 118a-119a,136a).

Just as in *Chaunt*, this Court need not "speculate" as to why petitioner misrepresented his age as 33 instead of 31 years old and why he misrepresented that he was born in the city of Kaunas instead of the rural area of Reistru. Both of those facts were "neutral" with respect to what information was necessary to enforce the immigration laws. None of those facts could form a basis for even a "tenuous line of investigation," let alone lead to the actual existence of an ultimate disqualifying fact. Here, petitioner correctly disclosed those facts necessary to satisfy the statutory standards of eligibility for a visa and naturalized citizenship.

This Court is not bound by the *dicta* in *Chaunt* that suggested an alternative approach to proving materiality where the truth of the suppressed facts themselves would not warrant revocation of citizenship. When the alternative approach was initially suggested in *Chaunt*, Justice Douglas expressed it as, "Or disclosure of the true facts might

have led to the discovery of other facts which would justify denial of citizenship", *Id.*, at 353; but later in the same opinion Justice Douglas injected the words "useful" and "possibly" in expressing the alternative as "or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.*, at 355.

This Court should, on the basis of the experience shown in this case, reject or abandon the *dicta* of *Chaunt*, which set forth two formulations of an apparent alternative approach to proving the materiality of facts suppressed or misrepresented in procuring citizenship. That so-called second prong of *Chaunt* has led some Circuit Courts to adopt "possibility" or "probability" standards of materiality, which here resulted in the anomaly of the Third Circuit finding an hypothesized, but non-existent, Nazi persecution visa requirement.¹ Such diluted standards can not logically be reconciled with the rigorous burden of proof by evidence that is clear, unequivocal and convincing (leaving no issue of fact or law in doubt) that this Court has consistently demanded in denaturalization cases at least as far back as *Schneiderman v. United States*, 320 U.S. 118, decided in 1943.

Even in *Chaunt*, this Court did not literally apply the "useful" and "possibly" language of Justice Douglas. It certainly would have been "useful" for the Immigration Service to have known that *Chaunt* had been arrested at

¹ At the oral argument on April 27, 1987, the Government conceded that there was no such statute or regulation: "We concede there's no statute or regulation". (TR Oral Argument 35).

least three times prior to becoming a citizen for engaging in public demonstrations in such a way that he was at least accused of violating city ordinances and park regulations. It is "possible", and arguably "probable", that those demonstrations and handbills might have reflected Chaunt's Communist affiliation as a district organizer of the Communist Party in Connecticut, although it is far from "certain" that such political activity showed a lack of intent to renounce foreign allegiance. At the very least, disclosure, instead of denial, of the arrests had the capability of leading to a Communist affiliation, from which an inference of continuing foreign allegiance could have been drawn. But this Court in *Chaunt* refused to engage in that form of speculation where the Government failed to prove the ultimate disqualifying fact of continuing foreign allegiance by "clear, unequivocal and convincing evidence". *Id.* at 355. Thus, it is not what this Court decided in *Chaunt* that has engendered a legacy of ambiguity and confusion among the Circuit Courts, but what Justice Douglas said in his *dicta*.

As pointed out by former Chief Judge Aldisert in his dissent when the Third Circuit grappled with the second prong of *Chaunt* in *United States v. Kowalchuk*,

"The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word "might", as contained in *Chaunt*, then one word will wipe out an entire galaxy of settled case law". 773 F.2d 488, 515 (C.A. 3, 1985).

During the first oral argument in the instant case, the Government took the position that the mere "possibility" standard of the second prong of *Chaunt* as construed literally could be satisfied on the basis of "reasonable sus-

picion" (TR of Oral Argument 37-38). That interpretation of "materiality" would not only wipe out a galaxy of case law on denaturalization, but would create an evidentiary standard heretofore unknown in any aspect of our jurisprudence, albeit the norm found in totalitarian societies.

The Government's proposed "reasonable suspicion" test is in extreme contrast to, and a radical departure from, the Justice Department position presented by then Deputy Attorney General Byron R. White to the Chairman of the Committee on the Judiciary on June 21, 1961 when he stated,

The rationale of these cases is that because United States citizenship is such a precious right, no person should be deprived of it under the ordinary evidentiary rules prevailing in civil actions and that the Government must establish its case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt. Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals, or other undesirables. *The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act.* In these circumstances, the Department does not feel that sufficient reasons exist for change. (Appendix to Petitioner's Reply Brief, p.2a). (Emphasis added).

To change that "firmly entrenched" denaturalization evidentiary rule by diluting it to a mere "probability" or preponderance test, or worse yet, to an equivocal mere "possibility" or "suspicion" test (not found anywhere else in our jurisprudence), would be to deprive all naturalized citizens of a substantive right. To require proof of a mere "possibility" or "probability" by clear, unequivocal and convincing evidence which does not leave any issue in doubt is a contradiction in terms and is irreconcilable with the express statutory language "procured by."

A. Clear, Unequivocal And Convincing Proof Of The Actual Existence Of An Ultimate Disqualifying Fact Should Be The Standard Governing The Materiality Inquiry Under 8 U.S.C. § 1451(a).

The "materiality inquiry" rests on the substantive law of the denaturalization statute which governs which facts are critical to it and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 475 U.S. —, 91 L.Ed.2d 202, — (1986). It is submitted that materiality, in the context of the denaturalization statute, should mean that the truth of the suppressed or misrepresented fact would have disqualified the applicant from having "procured" citizenship; or that its truthful disclosure would have led clearly and unequivocally to the actual existence of a disqualifying fact, which but for its suppression would have prevented citizenship from having been so "procured".

The record below in this case contains a stark illustration as to why the denaturalization statute must be construed to require the Government to prove by clear, unequivocal and convincing evidence the actual existence of

an ultimate disqualifying fact, and one where inferences are drawn not tenuously in favor of the Government, but as far as is reasonable in favor of the citizen. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). On July 16, 1982 the Government amended its Complaint to allege that the petitioner falsely swore that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania and that such representation demonstrated a lack of good moral character under 8 U.S.C. § 1101(f)(6) and constituted a "material fact" under § 1451 (a) (J.A.7-9,14,17-18). The Government did so on the basis of the Soviet deposition on April 20, 1982 of petitioner's sister-in-law, Juze Rudzeviciene, in which she stated that, although she was married in a civil ceremony in Kaunas on August 23, 1943, she did not know anything about her sister Sofia being married in Lithuania at about the same time in 1943 and thought she was married in Germany in "1949" before she came to the United States² (X1088,1096-1097).

Prior to amending the Complaint and supporting it with a statutorily required affidavit of "good cause" (J.A. 22-24), the Office of Special Investigations ("O.S.I.") did not even inquire of the Soviet Government as to whether the Register of the Marriage Bureau of Kaunas recorded the petitioner's marriage on August 24, 1943. Less than one month after the Government amended the Complaint, but nine days after the initially scheduled trial date of August 2, 1982, the Lithuanian Ministry of Justice pro-

² Petitioner and his wife had already left Germany in 1948 and arrived in the United States on April 29, 1948, as the Government knew from its INA files, which it used at her deposition. (J.A.40).

duced a certified copy of Marriage Certificate No. 783 issued by the Marriage Bureau in Kaunas, Lithuania on August 24, 1943 to petitioner and his wife Sofia Anuskeviciute Kungys. The O.S.I. did not disclose that evidence to petitioner until October 7, 1982 when it attached it to its supplemental response to Interrogatory No.2.³

The stamp of the Kaunas Marriage Bureau on Sofia Kungys' Lithuanian Provisional Identity Card, which was part of her immigration file, contains the same number 783 as the Register of the Kaunas Marriage Bureau and states "On August 24, 1943 married to Mr. Kungys, Juozas". (X172,174, 176).

Had this case proceeded to trial without the Lithuanian certification, the Government would have argued that (1) under the mere "possibility" test there was a "reasonable suspicion" that petitioner lied about his marriage; (2) under the "probability" test, it is probable that his sister-in-law would have known if her sister had been married on the very next day in Kaunas and her lack of such knowledge would support an inference in favor of the Government that petitioner had lied about the fact of his marriage; (3) that lying about his marriage in his immigration papers proved petitioner lacked good moral character; and (4) lying about his marriage concealed a fact as to petitioner's "identity" and was thus "material".

³ On January 31, 1983, the District Court, ordered, *inter alia*, that "Paragraph 13f, 17c, 19e, 22c, 39 at line 3 ('and true information concerning marital status'), 54 at lines 4-5 ('that he was married to Sofia Kungys nee Anuskeviciute'), 55 at lines 6-7 ('and that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania') and 56 at lines 2-4 are hereby stricken, with prejudice from the Complaint, as amended." (Docket entry 112, J.A.1).

Neither the petitioner nor his wife sought or obtained a marriage-related preference and thus, in any event, any representation as to the fact of their marriage was not for the "purpose" of obtaining a "benefit" under the immigration laws. Moreover, even if they had not in fact been married in Kaunas, being unmarried would not have constituted a disqualifying fact under the immigration laws. Clear, unequivocal and convincing evidence was available to the Government as to whether petitioner was in fact married in a civil ceremony in Kaunas. Yet the O.S.I. amended its complaint with an accompanying affidavit of good cause, which defamed petitioner and his wife without even making the basic inquiry to the Soviet Government as to whether the Register of the Kaunas Marriage Bureau recorded the marriage of petitioner on August 24, 1943. That experience clearly shows that the "possibility" and "probability" standards of proving "materiality" promote prosecutorial short cuts and pose a real threat to just results, especially with respect to this decade's wave of denaturalization cases that are so heavily dependent on Soviet evidence, to which the naturalized citizen has scant access.

B. The District Court's Determination Of The Materiality Inquiry Under 8 U.S.C. § 1451(a) Is A Finding Of Fact Subject To Review Only Under The Clearly Erroneous Standard Of Rule 52(a) Of The Federal Rules Of Civil Procedure.

The substantive law of denaturalization consists of (1) the statutory legal elements of section 1451(a) that naturalization must have been "procured by" a "concealment" or "misrepresentation" of a "material fact"; and (2) the

firmly entrenched denaturalization evidentiary standard embodied in the case law that each of such legal elements must have been proved by evidence that is clear, unequivocal, and convincing which leaves no doubt as to any issue, and where, to the extent reasonable, every inference is drawn in favor of the citizen. The materiality inquiry rests on that substantive law which governs which facts are critical and which are irrelevant. Materiality is thus a criterion for categorizing facts in relation to the legal elements of the denaturalization substantive law. Since the denaturalization law requires that it be proved that citizenship was in fact "procured by" the misrepresentation or concealment of a "material fact," such a fact must be one which is outcome determinative.

When the District Court made the finding of fact that had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet.App.C, 119a), that finding determined that petitioner's citizenship was not "procured by" any of his concealments or misrepresentations. When the Third Circuit agreed with the District Court that none of the facts that "were suppressed, if known, would have warranted denial of citizenship" (Pet.App.A, 20a), it showed that the District Court's finding of fact was "unassailable." *Icicle Seafoods, Inc. v. Worthington, supra*.

When the District Court made the findings of fact that truthful disclosures of what petitioner concealed would not have resulted in an investigation (Pet.App.C, 135a-136a), and would not have had any effect whatsoever on his eligibility for a visa or citizenship, those findings of fact should have been dispositive, even under the alternative approach to materiality suggested by the *dicta* in *Chaunt*, unless

clearly erroneous. Yet, here, the Third Circuit ignored Rule 52(a) and ignored the directive of this Court in *Icicle Seafoods* (decided two months prior) by making its own finding of fact that an investigation would have been conducted. In doing so, the Third Circuit did not determine and could not, on the basis of this record, have determined that the District Court's finding of fact was "clearly erroneous". See Point III, *infra* at pp. 33-42.

The Third Circuit's flawed review was compounded by its characterization of its speculative reasoning process under the second prong of *Chaunt* as a "probability" standard. (Pet.App.A, 22a). Based upon its *de novo* finding of fact that an investigation would have been conducted, the Third Circuit drew the illogical inference that the truthful disclosure of a correct date and place of birth would have led to an investigation of residency records in Germany. (Pet.App.A, 32a-33a). In doing so, the Third Circuit ignored the fact that the petitioner had fully disclosed each of his residences in Germany to the American Consulate (J.A.30). The Third Circuit's erroneous logic led it to the false conclusion that residency in Germany shortly before the Allied occupation "tended" to show that petitioner was not a victim of Nazi persecution, which in turn converted the concededly immaterial date and place of birth into "material" facts under its "probability" test.

The Third Circuit should never have engaged in such a tour de force since the District Court's finding of fact that the government's own proofs show that no investigation would have been conducted was not "clearly erroneous" based on the record. See also Point III, *infra*, at pp. 33-37. Even to the extent that the alternative approach to materiality is deemed a mixed question of fact and law, whether an investigation would have been conducted is a

factual component which is the sole prerogative of the District Court. *Pullman-Standard v. Swint*, 465 U.S. 273, 286-287 n.16 (1982).

Furthermore, the District Court's finding of fact that Seymour Finger was in error in testifying that the regulations required that the applicant for a non-preference quota immigration visa had to be a victim of Nazi persecution (Pet.App.C, 119a-120a n.7) was not "clearly erroneous" and should not have been ignored by the Third Circuit. Instead, the Third Circuit ignored that finding and ignored the actual regulation in the record (Pet.App.E, 140a-142a) in reaching its own *de novo* (and clearly erroneous) finding that the absence of being a victim of Nazi persecution was an ultimate disqualifying fact making the concealed date and place of birth "material" under the second prong of *Chaunt*.

Even with the attempts to read into the denaturalization statute a legal interpretation of "material" as merely "capable of influencing" and a diluted evidentiary standard of mere "probability" or "possibility", the District Court's findings that petitioner's concealments would have had no effect whatsoever and that no investigation would have been conducted, should be dispositive for petitioner.

III. THE REQUIREMENT OF SECTION 1451(a) THAT THERE CAN BE NO DENATURALIZATION FOR A MISREPRESENTATION OR CONCEALMENT OF A "MATERIAL FACT" UNLESS NATURALIZATION WAS "PROCURED BY" SUCH FACT INDICATES THE GOVERNMENT MUST PROVE THAT A DISQUALIFYING FACT ACTUALLY EXISTED

The use of the words "procured by" in the Section 1451(a) requirement that, before there can be a denatural-

ization, naturalization must have been "procured by concealment of a material fact or by willful misrepresentation" indicates that Congress intended that the Government must establish the actual existence of a disqualifying circumstance in order for a misrepresentation of fact to be material. See concurring opinion of Justice Blackmun in *Fedorenko*, 449 U.S. at 518-526; and dissenting opinion therein of Justice Stevens, 449 U.S. at 530-538. The use of the grammatical past tense in the phrase "procured by" should preclude the Government's statutory interpretations that a citizen can be denaturalized if the misrepresented fact merely "might have been" or could "possibly have" been, or "might have been useful" in, or "capable of influencing" the procurement of citizenship. The phrase "procured by" gives context to and limits the scope of the substantive "material fact" requirement. It is unambiguous in requiring that naturalized citizenship must have been "procured by" the immigrant having concealed or misrepresented a "material fact."

Conversely, if the true fact had been disclosed, or accurately represented, then that disclosure had to have been of the kind of fact that would have resulted in making the immigrant ineligible for citizenship. Thus, the Government's argument that denaturalization is authorized for misrepresentations "even though truthful answers regarding the misrepresented facts would not necessarily have required that result but simply might have required it", (Brief for the United States, p.20), is contradicted by the plain meaning of the words "procured by" in Section 1451 (a). "Material fact" is not an isolated phrase or abstract thought capable of independent interpretation. Materiality is a criterion for categorizing facts in relation to the legal

elements of the denaturalization statute. Here, "material fact" must be read in the context of a fact that was suppressed and as a direct result citizenship, for which the immigrant was not otherwise eligible, was "procured by" suppressing or misrepresenting such fact. Thus, a "material fact" has to be a fact which is controlling or outcome determinative, not merely a fact that might be relevant or possibly of interest. As this Court observed in *Anderson v. Liberty Lobby, Inc.*,

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." 475 U.S. — at —, 91 L.Ed 2d 202, (1986).

When the District Court found that had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet.App.C, 119a), it clearly meant that petitioner's citizenship could not have been "procured by" any of his misrepresentations or concealments. Had the petitioner made truthful disclosures of that which was misrepresented or concealed, it would not "have had any effect whatsoever", as the District Court found (*Ibid*). Indeed, the Third Circuit agreed with the District Court that none of the facts that "were suppressed, if known, would have warranted denial of citizenship" (Pet.App.A, 20a). Thus, the words "procured by" would have to be read out of the statute, or given an unnatural and ungrammatical meaning, before the Government's proposed "possibility" and "might have" tests for materiality could prevail. The "procured by" statutory language also undermines the alternative approach of

Chaunt if Justice Douglas' *dicta* were to be construed literally; whereas proof of the actual existence of an ultimate disqualifying fact is consistent with the "procured by" statutory requirement; the actual holding in *Chaunt*; the actual holding in *Fedorenko*; and the clear unequivocal, and convincing evidentiary standard in *Schneiderman*.

The Government would have this Court borrow case law which has interpreted the meaning of materiality in federal criminal statutes (18 U.S.C.1621, 18 U.S.C.1623 and 18 U.S.C.1001), irrespective of their different purpose and despite the denaturalization statute's specific requirement that naturalization had to have been "procured by" the misrepresentation of a material fact (Brief of United States, pp.25-28). Those same arguments were made in the Government's Brief in *Fedorenko* and were not persuasive in view of the specific language of the Displaced Persons Act ("DPA"), which required that the misrepresentation be "for the purpose of gaining admission into the United States as an eligible displaced person". 62 Stat. 1013. See *Fedorenko*, 449 U.S. at 507. That additional purpose or intent language of the DPA is similar to the additional "procured by" language of the denaturalization statute and the additional "for purposes of obtaining any benefit" language of the pre-naturalization statute. Thus, each of those immigration statutes has an additional legal element which makes them dissimilar to the federal criminal perjury and false swearing statutes, although all of the statutes require proof of some form of materiality.⁴

⁴ It is anomalous that any criminal prosecution for false swearing would afford the defendant the greater procedural and constitutional safeguards of trial by jury, after an indictment by

The Government argues that, "The materiality standard under those [criminal] statutes does not require a showing that disclosure of the true facts would necessarily have led to a different result" (Brief for U.S., p.25), and cites mainly to pre-*Fedorenko* cases for the proposition that a false statement is "material" if it is merely "capable of influencing" a court, grand jury or government agency. Part (c) of 18 U.S.C. § 1623, entitled *False declarations before grand jury or court*, expressly requires "proof that the defendant while under oath made irreconcilable contradictory declarations *material to the point in question . . .*", and part (d) bars prosecution if the declarant makes an admission before the false declaration has "not *substantially affected the proceeding . . .*" (emphasis added). 18 U.S.C. § 1621, entitled *Perjury generally*, covers "any *material* matter which he does not believe to be true"; and 18 U.S.C. § 1001, entitled *Statements or entries generally*, is aimed at a government claimant who "willfully falsifies, conceals or covers up by any trick, scheme, or device a *material* fact". Each provides for fine and imprisonment and none refers or relates to denaturalization.

None of those false swearing statutes requires that a respondent, at his peril, make a perfect score and be completely accurate in responding to every inquiry a governmental representative chooses to make. Instead, each of the false swearing statutes requires proof of some form of

(Continued from previous page)

a grand jury, where the defendant has the protection of the right against self-incrimination and has the presumption of innocence; whereas the naturalized citizen is subject to the "extraordinarily severe penalty" of denaturalization without any of those safeguards to liberty. *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

materiality consistent with the object or purpose of the statute.

Moreover, neither 8 U.S.C. § 1427(a) nor the definition of lack of good moral character in § 1101(f)(6) make false swearing a *per se* disqualification. The Government's argument that "Read literally, these provisions suggest that even a single piece of false testimony can disqualify a person from citizenship because of a lack of good moral character" requires the reader to ignore the critical purpose language that the false testimony be given "for the purpose of obtaining any benefits under this chapter [immigration laws]." (Brief of United States, p.45).

Since the effect of denaturalization is so drastic to the naturalized citizen and so much more "an extraordinarily severe penalty" than a fine or imprisonment, the requirement of materiality for denaturalization should not be diluted by borrowing from case law lessening the governmental burden under the inapplicable false swearing statutes. *Klapprott v. United States*, 335 U.S. 601, 612 (1948). The use of the words "procured by" should indicate that for a fact to be "material" it must be a fact which actually influenced an immigration official, such that but for the misrepresentation or suppression, naturalization would not have been "procured".

In any event, even if this Court were to adopt the Government's diluted test that a misrepresented or concealed fact becomes "material" merely by being "capable of influencing" an immigration official's decision, petitioner could not be denaturalized in view of the District Court's findings. As demonstrated *supra*, the District Court's findings, that the truthful disclosure that petitioner had been born on September 21, 1915 in Reistru would not

"have had any effect whatsoever" (Pet.App.C, 119a), precludes such facts from being "capable of influencing" an immigration official to deny a visa or naturalization.

The District Court further found that even former Vice Consul Seymour Finger (who gave false testimony as to a non-existent Nazi persecution visa regulation requirement) "would not have denied a visa even to a manager of a 15 employee brush and broom factory" (Pet.App.C, 119a). That finding precludes petitioner's alleged omission on his Alien Registration Form of one of his past "activities" as a clerk-bookkeeper in a brush and broom shop from being "material". A vice consul could not have been so influenced by its omission that he could have properly denied a visa on a ground of exclusion under the law. *United States ex rel. Teper v. Miller*, 87 F.Supp. 285 (S.D.N.Y. 1949). Indeed, in this case Frank K. Schilling, the vice consul who actually processed petitioner's file had a translation of petitioner's Lithuanian identification card which listed his occupation in Lithuania as "Occupation Office-Worker" (J.A.28). That available and disclosed information obviously did not so influence Frank K. Schilling that he denied a visa to petitioner. Indeed, the visa application itself required only a statement of what the immigrant's present "calling or occupation is", to which petitioner correctly answered "dental technician" (J.A.30).

The Government argues that the absence from the Visa Application of petitioner's alleged residence in Kedainiai in the summer of 1941 constituted concealment of a fact "capable of influencing" a Vice Consul not to grant a visa. The District Court, however, found that even if Seymour Finger had been the vice consul who processed petitioner's application, "the fact of residence in Kedainiai

during 1940-1942 would not have raised any questions in his mind" (Pet.App.C, 136a). Moreover, Section 7(b) of the Immigration Act of 1924 required disclosing residences only for 5 years preceeding the visa application or here back to January 1942, which meant that there was no statutory requirement that petitioner had to have listed his residence in Kedainiai in the summer of 1941. If a non-disclosed fact was not statutorily required and would not have raised any question, how could it be "capable of influencing" a proper immigration decision?⁵

Petitioner disclosed his wife's birthplace as Kedainiai (J.A.30) and, as the District Court found, she listed her birthplace and residence in Kedainiai (Pet.App.C, 119a) in their jointly processed visa applications. Moreover, Government witness Kostas Januska, also a former member of the Siauliai, listed his residence in Kedainiai on his visa application (X189-192, X1105-1165) and was granted a visa without triggering off any investigation. Indeed, Seymour Finger testified that he did not even know where Kedainiai was, although he saw it listed on petitioner's visa application (J.A.208). The significance of the former Vice Consul's observation of the name of the town of Kedainiai on the visa application is that it shows it was, at a minimum, mentioned in the communications between petitioner and the German speaking personnel at the American Consulate who actually filled out petitioner's Visa Application and Alien Registration Forms. Former CIC Officer Hartman's testimony established that there were a great deal of discrepancies between entries on visa forms and what the ap-

⁵ The Foreign Service regulations required that "An immigration visa may be refused only on a ground provided in the law and regulations". 22 C.F.R. § 61.346(c).

plicant actually said to the Consulate: "Generally, the applicant was simply asked whether the data on the visa application was correct, but he had no way of knowing. The documents were in English" (X1727-1730, X1735-1741).

The District Court found that the petitioner did not change his identity as he "continued to use his own name" and that none of his alleged concealments of facts served to "insulate" him "from charges of war crimes" (Pet.App.C, 118a-119a). Even the Third Circuit, after its review of the District Court's findings, agreed that "because there is no hard evidence in the record that the consulate officials in Stuttgart had knowledge of these particular atrocities at the time defendant applied for his visa, and the government did not prove that knowledge of the defendant's residence would have prompted an investigation, we cannot conclude that this concealment alone was material under the second prong of *Chaunt*" (Pet.App.A, 35a). The District Court was even stronger in its ultimate finding that, "This is far from proof by clear, unequivocal and convincing evidence that an investigation would have occurred if defendant had given truthful responses to all four of the matters as to which his answers were false" (Pet.App.C, 136a).

Under Rule 52(a) of the Federal Rules of Civil Procedure, the District Court's finding that disclosure of none of the suppressed or misrepresented facts would have resulted in an investigation should not have been set aside, or, as here, ignored by the Third Circuit, unless it was clearly erroneous. In view of *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. —, 106 S.Ct. 1527 (1986), the Third Circuit erred in making its own *de novo* finding that discrepancies in post-war Allied-occupation, German municipal residency records as to petitioner's date and place of

birth would have resulted in an investigation. (Pet.App.A, 32a-33a). In making that finding the Third Circuit (1) had to ignore the District Court's finding that disclosure of the truth would not have resulted in an investigation; (2) had to make an unsupportable inference that there is any logical connection between disclosure of true date and place of birth and prior residences in Germany; (3) ignore the fact that petitioner fully disclosed each of his residences in Germany in the Visa application without triggering off an adverse investigation; and (4) ignore the reference on the Visa Application by Vice Consul Schilling that "Police Dossier available" which presumptively meant that he had checked with the police in all of the residences listed by petitioner and had not found any adverse information "capable of influencing" his decision on whether to grant a visa to petitioner.

Contrary to this Court's directive in *Schneiderman* that, "So uncertain a chain of proof does not add up to the requisite clear, unequivocal and convincing evidence for setting aside a naturalization decree", 320 U.S. at 159, the Third Circuit made an improper leap of logic from a misrepresented date and place of birth to its *de novo* finding of an investigation into German residences and from that inference continued on to the tenuous, and ultimately irrelevant, conclusion that petitioner was not a victim of Nazi persecution. If that tour de force, which is the basis for the Third Circuit's reversal of the District Court, is left unreversed, then ". . . valuable rights would rest upon a slender reed, and the security status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times". 320 U.S. at 159.

There can be no doubt that the flawed review of the record, the strained and illogical reasoning, and the improper *de novo* findings of the Third Circuit just two months after the opinion of this court in *Icicle Seafoods, Inc., supra*, could have resulted only from the "hydraulic pressure" created by the belated Soviet accusations that petitioner committed atrocities in 1941.

Although the Government would now have this Court establish a standard of materiality that would permit speculation as to what an investigation conducted then "might" have "possibly" disclosed, the Government admitted during discovery that there existed no information whatsoever about petitioner in the records of the Federal Bureau of Investigation, the Central Intelligence Agency, the State Department Office of Security, the Berlin Document Center, the Federal Republic of Germany, the Weisenthal files, the International Refugee Organization, and the subcommittee of Immigration, Citizenship and International Law of the Judiciary Committee that would then have prompted an investigation. [Answers to Interrogatories No. 39, 41-45, and 48 (X1314-1315)]. Irrespective of date and place of birth, no Juozas Kungys was identified as a person about whom there was adverse information.

There is no contemporaneous Soviet report or document in the record referring to petitioner as either the leader or participant in the atrocities.⁶ Indeed, two of the

⁶ The American consular officers did not have access to Soviet sources of investigation (NKVD). As stated in the 1948 Senate Judiciary Report on Displaced Persons in Europe, "Access to official records or witnesses in the Russian Zone is precluded". (p.27). As former vice consul Finger testified the sources of investigation were the consular files, the German police and the refugee camps. (J.A.198-199).

Soviet witnesses testified that they had read Communist newspaper articles about the atrocities in Kedainiai after the War and they made no reference to petitioner, but instead had stated that one Kubiliunas was shot for being the leader who committed those atrocities. (Dailide, X1014-15 and Devidonis, X721, see also X234).

No UNRRA screening committee, on which there were Soviet representatives, ever accused petitioner of being a Nazi collaborator. (See J.A.69). After the Allied occupation, German civil authorities attested to the good conduct of petitioner (J.A.37), and not even the Soviets had made any accusation against petitioner at the time of his application for visa in January 1947 or citizenship in February 1954. (X19-20).

In response to petitioner's requests to admit, the Government (which then knew petitioner's correct date and place of birth and all of his residences and occupations) conceded that there were no records that petitioner was ever a member of the Nazi party, the German military, any police organization, or that he ever was convicted of a crime anywhere. (X19-20, X1309-10, Admission and amended Admissions, 3, 4, 18, 19, 21, 26, 45, and concessions at oral argument on January 24, 1983 before Magistrate Peretti, Docket Entry No.115).

At the trial, the Government did not produce a single witness in the Free World who had first-person actual knowledge that petitioner committed any atrocity. The Government introduced voluminous German records which depicted the Nazi persecutions and murders throughout Lithuania (G Series, X212-474). The Government admitted that none of the German records contains petitioner's

name or indicates that the petitioner had in any way participated in any of the persecutions or killings. (Admission No. 26, A573). In its opinion, the District Court expressly found that although: "[the German records] constitute evidence that [the Nazis] used local people in the course of their work, they do not refer to the use of local people at the killings in Kedainai nor do they implicate the defendant in this case in any way". (Brackets added) (Pet.App.C, 52a).

The Third Circuit by-passed, and thus did not disturb, the District Court's finding that the Soviet depositions were unreliable and inadmissible. No reasonable appellate court could have found that the District Court's findings were "clearly erroneous" within the meaning of Rule 52(a). In accordance with the teaching of *Icicle Seafoods, Inc.*, the District Court's findings were "unassailable" and the District Court applied the proper rules of evidence and constitutional law as set forth in prior opinions of this Court and the Third Circuit itself. 475 U.S. at —, 106 S.Ct. at 1527.

The Third Circuit had previously been clear as to the standard of review as to ultimate facts, stating, "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data". *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (C.A. 3, 1972).

The District Court undertook a detailed analysis of the reasons for its ultimate findings as to the Soviet depo-

sitions⁷ and found, *inter alia*, (a) "many aspects of the deposition procedures cast doubt upon the reliability of the testimony concerning defendant" (Pet.App.C, 95a) including: (1) warm up questioning by the Soviet Procurator to lock in the witnesses' testimony (Pet.App.C, 92a-98a); (2) limitations imposed by Soviet Procurators on the scope of petitioner's cross-examination of the Soviet witnesses (Pet.App.C, 92a-101a); (3) interference with petitioner's cross-examination of the Soviet witnesses by the Soviet procurator (Pet.App.C, 99a-100a); (4) strategic omissions and mistranslations of the testimony of the Soviet witnesses by the Soviet interpreters (Pet.App.C, 101a); (5) the pervasive use of blatantly leading questions by the Government, "improperly affecting" the entire proceeding (Pet.App.C, 98a); and (6) interference by the Government in the cross-examination of the Soviet witnesses (Pet.App.C, 100a); and (b) "that these depositions, insofar as they purport to inculcate defendant, are unreliable" (Pet.App.C, 86a), noting (a) material inconsistencies between the deposition testimony and the deponents' "protocols" (Pet.App.C, 104a-105); (b) the failure of any witness to identify unequivocally the wartime photo-

⁷ The Soviet depositions were taken *de bene esse* pursuant to an order dated October 14, 1981 (A50-52). That order provided that the depositions would "be governed by the Federal Rules of Civil Procedure and plaintiff shall not interfere directly or indirectly with the right of defense counsel to conduct a full and free cross-examination of each witness" (A52), and that "no witness shall be instructed by plaintiff not to answer any questions". (A52). That order also provided that the Government "shall have present at each day of each deposition in Europe translators proficient in Lithuanian and Russian who are disinterested in the outcome of the lawsuit . . ." (A52; Pet.App.C., 95a). At the depositions the Government disregarded such fundamental procedural safeguards.

graph of petitioner (Pet.App.C, 80a,83a,86a); (c) the absence of earlier "protocols" and transcripts of earlier testimony by the deponents about the Kedainiai killings (Pet.App.C, 105a-108a); (d) the potential for undue influence by Soviet authorities over the deponents (Pet. App.C, 97a-105a); and (e) material inconsistencies in the testimony of the Soviet witnesses.

Following that lengthy analysis of its holding, the District Court finally concluded,

"The Lithuanian depositions will be admitted for the limited purpose of establishing the happening of the killings in Kedainiai in July and August 1941. They will not be admitted as evidence that defendant participated in the killings". (Pet.App.C, 108a).

A trial court's discretionary determinations as to the admissibility of evidence are significant on appeal only if "manifestly erroneous". *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284 (C.A. 3, 1979), *cert. denied*, 444 U.S. 917, *reh. denied* 444 U.S. 985 (1980); *Atlantic Mutual Ins. Co. v. Lavino Shipping Co.*, 441 F.2d 473 (C.A. 3, 1971); *United States v. Lopez*, 543 F.2d 1156 (C.A. 5, 1976), *cert. denied*, 429 U.S. 1111 (1977).

Moreover, with respect to a non-jury trial, error can only be predicated upon a gross abuse of discretion with respect to the admissibility of evidence provided the Court considers that which is offered. The trial court, sitting as both judge and trier of the facts, is presumed to disregard the inadmissible and rely upon competent evidence. *Plummer v. Western Intern. Hotels, Co., Inc.*, 656 F.2d 502 (C.A. 9, 1981); *Multi-Medical Convalescent and Nursing Center of Towson v. N.L.R.B.*, 550 F.2d 974 (C.A. 4, 1977); *United States v. Nicholson*, 492 F.2d 124 (C.A. 5, 1974); *Caldwell v. Craighead*, 432 F.2d 213 (C.A. 6, 1970), *cert.*

denied, 402 U.S. 953 (1971); *Teate v. United States*, 297 F.2d 120 (C.A. 5, 1961).

The District Court's determination to accord only limited use to the Soviet depositions is well within its discretion and consistent with the decisions of several other American courts in denaturalization cases brought by the Government with the assistance of the KGB. Rule 105, Fed.R.Evid.; and *see, e.g., United States v. Linnas*, 527 F.Supp. 427 (E.D.N.Y. 1981), *aff'd* 685 F.2d 427 (C.A. 2, 1982); *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981), *appeal dismissed*, No. 81-1956 (C.A. 3, July 22, 1981); *United States v. Kowalchuk*, 571 F.Supp. 72, 79-80 (E.D.Pa. 1983), *aff'd*, 773 F.2d 488 (1985), *cert. den.*, 1065 S.Ct.1188 (1986). *Maikovskis v. I.N.S.*, [Immigration Court June 30, 1983], 773 F.2d 435 (C.A. 2, 1985), *cert. denied*, 106 S.Ct. 2915 (1986).

In *United States v. Kowalchuk*, *supra*, the District Court stated,

"The testimony of the Soviet witnesses must be viewed with even greater skepticism . . . Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as 'clear and convincing' proof of charges as serious as those leveled against this defendant". (571 F.Supp. at 79-80).

In its brief to the Court of Appeals in the *Kowalchuk* appeal, the Government stated,

"The District Court specifically stated that it did not rely on any of the Soviet witness testimony concerning the acts of defendant himself . . . Although the government believes that the depositions should have been credited in their entirety, the *District Court*

was not in error in crediting them only to a limited extent. (Government Brief, p.37) (Emphasis added).

In view of the absence of any Free World testimony, the demonstrated unreliability of the Soviet evidence, and the unsupportable claims of Seymour Finger, this hydraulic pressure case should never even have been prosecuted; let alone should a judgment of an appellate court be left standing when based on an improper appellate *de novo* finding predicated on false testimony by a government witness as to a non-existent visa regulation requirement.

CONCLUSION

The Judgment of the Third Circuit should be reversed and the Judgment of the District Court should be reinstated, without any further remand, since even pursuing legal theories based upon speculation and suspicion can not convert the innocuous, if not trivial, misstatements of petitioner into material facts, by which petitioner "procured" his citizenship.

Respectfully submitted,

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August, 1987

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No. 86-228

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In The
Supreme Court of the United States
October Term, 1987

— o —
JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

— o —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

— o —
**PETITIONER'S REPLY BRIEF TO THE
SUPPLEMENTAL BRIEF FOR THE
UNITED STATES ON REARGUMENT**

— o —
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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	
I. The Government May Not Avoid The Materiality Requirement of Section 1451(a) By Relying On The Definitional Section 1101(f) (6)	1
A. "The Illegally Procured" Amendment Did Not Eliminate The Materiality Requirement Of Section 1451(a)	5
B. The 1961 "Illegally Procured" Amendment Is Not Applicable To Petitioner's 1954 Citizenship	8
II. The <i>Chaunt</i> "Materiality" Holding Requires Proof Of An Ultimate Disqualifying Fact	10
A. It Would Be An Unwarranted Oversimplification To Dilute The Materiality Requirement Merely To Mean Either "A Natural Tendency To Influence" Or "Capable Of Influencing" ...	15
III. Only Unwarranted Judicial Revision Could Change The Causal "Procured By" Requirement Of Section 1451(a) To A Self Obvious Description That The Material Misrepresentation Or Concealment To Obtain Citizenship Had To Have Been Made "In The Course Of" The Visa Or Naturalization Proceedings	17

TABLE OF AUTHORITIES

CASES	Page
<i>Ablett v. Brownell</i> , 240 F.2d 625 (C.A. DC, 1957) _____	7
<i>Anderson v. Liberty Lobby, Inc.</i> , 475 U.S. —, 91 L.Ed 2d 202 (1986) _____	16
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960) _____	<i>passim</i>
<i>Costello v. United States</i> , 365 U.S. 265 (1961) _____	16
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981) _____	<i>passim</i>
<i>Schneiderman v. United States</i> , 320 U.S. 118 (1943) _____	16, 18
<i>United States ex rel. Jankowski v. Shaughnessy</i> , 186 F.2d 580 (C.A. 2, 1951) _____	7
<i>United States v. Riela</i> , 337 F.2d 986 (C.A. 3, 1964) _____	9
<i>United States v. Rossi</i> , 299 F.2d 650 (C.A. 9, 1962) _____	7, 14
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (C.A. 10, 1983) _____	1, 4

STATUTES

Immigration Act of 1924, Pub.L. No. 68-139, Ch. 190, 43 Stat. 153, <i>et seq.</i> _____	7, 9
Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 <i>et seq.</i> _____	8, 9, 16
8 U.S.C. § 1101(f)(6) _____	1, 5, 6, 8, 10
8 U.S.C. § 1427(a) _____	1, 5, 7
8 U.S.C. § 1451(a) _____	1, 2, 4, 5, 6, 8, 9, 17, 18

RULES AND REGULATIONS

Federal Register, December 24, 1945, 22 C.F.R. § 61.313(a)(3)(i)(c) _____	14
--	----

TABLE OF AUTHORITIES—Continued

	Page
OTHER AUTHORITIES	
Black's Law Dictionary (1968)	15
H.R. Rep. 1086, 87th Cong. 1st Sess. (1961)	4
Presidential Directive, Dec. 22, 1945	14
U.S. Code Congr. & Admin. News (1961)	4, 8
Webster's New Collegiate Dictionary (1977)	15, 16

ARGUMENT

I. THE GOVERNMENT MAY NOT AVOID THE MATERIALITY REQUIREMENT OF SECTION 1451(a) BY RELYING ON THE DEFINITIONAL SECTION 1101(f)(6)

In its Supplemental Brief, the Government refers to a definitional section [Section 1101(f)(6)] of the immigration laws as if it is a substantive basis for denaturalization in its attempt to avoid the explicit requirement of Section 1451(a) that before a citizen can be denaturalized the Government must prove that naturalization had been "procured by concealment of a material fact or by willful misrepresentation" [of a material fact] (Supp. Gov't Br. 5-16). In doing so, the Government argues that the District Court and the Third Circuit below herein and the Tenth Circuit in *United States v. Sheshtawy*, 714 F.2d 1038 (1983), all erred in concluding that, for purpose of denaturalization, Section 1101(f)(6) requires that the false testimony be material (Supp. Gov't Br. 9-10). What the courts below actually held was that the Government can not avoid the explicit "material fact" requirement of the denaturalization statute [1451(a)] by resorting to a definition of good moral character [1101(f)(6)], whose words are found only in the naturalization statute [1427(a)].

At the trial level, the Government argued the tautology that (a) false testimony alone without proof of materiality establishes lack of good moral character; (b) lawful admission requires good moral character; and thus, citizenship is "illegally procured" by one who gives any false testimony. In response the District Court held that, "The *Chaunt* case and its progeny, discussed below, certainly do not support the government's position. Therefore, again insofar as misrepresentations, under oath or otherwise, are concerned, the Government's illegal procurement ground

overlaps its concealment or misrepresentation ground.” (Pet.App.C, 123a) The Third Circuit affirmed that conclusion of the District Court in stating that “Consequently, our analysis under the ‘concealment of material fact or willful misrepresentation’ portion of Section 1451(a) will be no different than that under the illegal procurement provision. We will not permit the government to escape the *Chaunt* materiality requirement by invoking Section 1101(f)(6)” (Pet.App.A, 28a).

In 1961, Section 1451(a) of the Immigration and Nationality Act of 1952 was amended to restore the words “illegally procured” as a comprehensive ground to include non-misrepresentational conduct and conditions as a basis for denaturalization without proof of fraud. A non-misrepresentational ground, such as contraction of a dangerously contagious disease, does not require under the illegal procurement amendment proof of a misrepresentation as to a material fact; but Congress did not delete from Section 1451(a) the requirement that, as to misrepresentations, the Government must prove that naturalization had been “procured by concealment of a material fact or by willful misrepresentation [of a material fact].” Since “illegally procured” covers non-representational facts and conditions, it is not redundant as to the “material fact” element of the misrepresentational ground. Instead, illegal procurement, if it is construed also to cover a misrepresentation, would overlap the misrepresentation of material fact ground.

Under either clause of Section 1451(a) there must be proof that citizenship was “procured” by a misrepresentation of a “material fact” before a citizen can be denaturalized. If Congress intended otherwise, it would simply have deleted the “material fact” language from Section 1451

(a), since that language would be inconsistent and contradictory if every misrepresentation in the course of an immigration proceeding could be the basis for denaturalization. At no prior time when the "illegally procured" language was part of the denaturalization statute had it been construed by the Courts or Congress to mean that a naturalized citizen could be denaturalized on the basis of any misrepresentation. Certainly there is no indication that it was ever intended to cover misrepresentations as innocuous as whether a citizen was 31 or 33 years old or was born in a rural town instead of a city.

Under the Government's faulty logic the denaturalization statute would cover both of the diametrically opposed concepts of every misrepresentation and only misrepresentations which were material. It would be nonsensical for Congress to pass a statute which excludes that which it permits. The Government fails to recognize the difference between a redundancy and what is at most an overlap, as pointed out by the District Court (Pet.App.C, 123a). Conversely, the Government also fails to recognize that the "material fact" requirement of Section 1451(a) would be eliminated and be superfluous if every misrepresentation or concealment caused citizenship to have been "illegally procured." It should be obvious to the Government that certain prior conduct (such as rape) or conditions (such as having a dangerous contagious disease) are non-representational, albeit substantive, facts that cause subsequently acquired citizenship to have been "illegally procured", irrespective of whether accompanied by a misrepresentation as to their existence. Indeed, an immigrant may unknowingly have a dangerous contagious disease and yet still be denaturalized upon its subsequent discovery. Each of those non-representational conduct and conditions

concerns what Congress viewed as matters of substance and not that which is trivial or innocuous. For instance, not every disease is a basis for denaturalization (See Appendix to Pet. Reply Br., 3a).

Before adopting the same view the Tenth Circuit articulated in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (1983), the Third Circuit herein examined the legislative history of the 1961 illegal procurement amendment to Section 1451(a) and found,

We also find that the legislative history of the illegal procurement amendment to section 1451(a) does not evince a clear intent of Congress to provide an escape from the materiality requirement in false testimony cases. Rather, the House Report indicates an intent to allow denaturalization based on substantive facts, where, for example, no fraud or concealment was involved, without a showing of willful misrepresentation or concealment. See H.R.Rep.No.1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2982-84. The report indicates concern, for example, with naturalizations of those guilty of rape, fraud, and aid to illegal aliens. *Id.* at 2983. We believe Congress was concerned with cases where it was impossible to prove willful misrepresentation or concealment rather than with cases where the object of concealment was not material. (Pet.App.A, 27a).

This Court in *Fedorenko v. United States*, 449 U.S. 490, 509 (1981) held that the "illegal procurement" ground for denaturalization still required proof of materiality where the immigrant therein concealed his prior status as a concentration camp guard during World War II. It is puzzling as to how the Government, which conceded in *Fedorenko* that a misrepresentation had to be material under Section 10 of the Displaced Persons Act because it had to have been made "to gain admission into the United States", can plausably argue that the in tandem Section

1101(f)(6) language “for purpose of obtaining any benefits under [the immigration laws]”, which would include gaining admission, does not require proof of a misrepresentation of a material fact when the Government attempts to fold it back into the denaturalization statute.

A. “THE ILLEGALLY PROCURED” AMENDMENT DID NOT ELIMINATE THE MATERIALITY REQUIREMENT OF SECTION 1451(a)

In *Fedorenko* the Government alleged both that petitioner had procured his citizenship illegally and that he had willfully concealed the material fact of being a concentration camp guard (*id.* at 493). The majority opinion of this Court specifically stated that one of the issues to be resolved was “whether petitioner’s failure to disclose, in his application for a visa to come to this country, that he had served during the Second World War as an armed guard at the Nazi concentration camp at Treblinka, Poland, rendered his citizenship revocable as ‘illegally procured’ or procured by willful misrepresentation of a material fact.” (*Ibid.*). Petitioner therein also falsified his visa application by lying, *inter alia*, about his birthplace (*id.* at 496 n.8). In that complaint the Government made the same allegation as here that petitioner had made the false statements to secure naturalization and thus failed to satisfy the good moral character requirement of Section 1427(a) (*id.* at 498 n.11). There, as here, the District Court found that petitioner’s false statement as to his birthplace was not a “material” misrepresentation (*id.* at 503 n.21).

Although the majority opinion in *Fedorenko* indicated that prior cases recognized that “there must be strict compliance with all the Congressionally imposed prerequisites to the acquisition of citizenship” (*id.* at 506), naturalized

citizenship would not be set aside as "illegally procured", even where there is an undisputed lie in the visa application unless the willful misrepresentation was about a "material fact" (*id.* at 507). *Fedorenko* presented this Court with a denaturalization case involving "the lawfulness of his initial entry into the United States", which the majority indicated that "at the outset, we must determine the proper standard to be applied in judging whether petitioner's false statements were material" (*id.* at 508).

The "plain language" of the Displaced Person's Act admonition that making a misrepresentation "for the purposes of gaining admission into the United States" shall make such displaced person not admissible did not mean that proof of any lie in an application ended the court's inquiry. As the majority in *Fedorenko* held, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material facts' " (*id.*, at 507). Since there is no appreciable difference in the "for purposes of obtaining any benefits," language of Section 1101(f)(6), the Government can not avoid the materiality requirement which applies to misrepresentations under both the "illegally procured" phrase and the "material fact" clause of Section 1451(a). Thus, the Government is wrong in contending that the courts below erred, when their decisions followed this Court's precedents in *Chaunt* and *Fedorenko*. Indeed, the decisions of the courts below were a necessary corollary to the Government's prior concession that the plain language of "for purposes of gaining admission" requires proof of the materiality of any misrepresentation.

It is implicitly clear from all of the opinions in *Fedorenko* that the "illegally procured" addition to the language of Section 1451(a) did not eliminate the requirement

that the Government prove the actual existence of a material fact (*id.* at 509, 524,, 528 n.8, 537). Although the majority of the Court found it "unnecessary to resolve the question whether *Chaunt's* materiality test also governs false statements in visa applications," the majority did give a minimal definition that "a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa" (*id.* at 509). Here, the District Court unassailably found that petitioner's misrepresentations would have had no effect whatsoever on petitioner's eligibility for a visa and had he "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet. App.C., 119a). Thus, irrespective of whether *Chaunt* applies at the visa stage, petitioner did not "illegally procure" his visa in view of the materiality requirement of *Fedorenko*.

The majority in *Fedorenko* cited with approval to *United States v. Rossi*, 299 F.2d 650, 652 (CA 9, 1962) that it was a foregone conclusion that a false statement in a visa had to be evaluated based upon its effect on the petitioner's admissibility and stated, "It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country" (*id.* at 509). The Court's analysis referred to the Section 1427(a) requirement that an applicant for citizenship had to be lawfully admitted to the United States and then pointed out that the petitioner there, as the petitioner here, entered this country under the Immigration Act of 1924, section 13(a) of which was construed by the courts to mean that a visa obtained through a material misrepresentation was not valid, citing to *Ablett v. Brownell*, 240 F.2d 625, 629 (CA D C 1957) and *United States ex rel. Jankowski v. Shaughnessy*, 186 F.2d 580, 582 (CA 2, 1951).

Thus, not only would this Court have to treat the "material fact" requirement of Section 1451(a) as a nullity, but also this Court would have to disregard the common analysis in all of the opinions in *Fedorenko* and *Chaunt* that proof of a material fact is an indispensable element in denaturalization proceedings, in order to adopt the Government's argument that it need not prove materiality when it attempts to incorporate the false testimony definition of Section 1101(f)(6) into the "illegally procured" phrase of amended Section 1451(a).

B. THE 1961 "ILLEGALLY PROCURED" AMENDMENT IS NOT APPLICABLE TO PETITIONER'S 1954 CITIZENSHIP

The Government's argument that petitioner is subject to denaturalization for want of good moral character irrespective of the materiality of his misrepresentations is based solely on incorporating that definition of Section 1101(f)(6) subliminally into the "illegally procured" amendment of Section 1451(a) in 1961 (Supp. Gov't Br. 5-16). Yet, when petitioner applied for citizenship on October 23, 1953 and when he was granted citizenship in February 1954, "illegally procured" was not part of the Immigration and Nationality Act, enacted on June 27, 1952 and known as the McCarran Act, 8 U.S.C. § 1451(a). His petition for citizenship referred only to the then statutory standard of "concealment of a material fact" (J.A. 42). Indeed, the 1961 amendment is silent as to any retroactive application (See 1961 U.S. Code Cong. & Admin. News 729); whereas the 1952 McCarran Act contains a Savings Clause, Section 405, in which Congress assured that "when an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be deter-

mined under the provisions of law in effect on the date of the issuance of such visa . . ." Petitioner's visa was issued on March 4, 1948 and he was not excludable under the classes of persons listed on the visa application and as set forth in the regulations under the Immigration Act of 1924 (J.A. 31-32).

Since petitioner correctly disclosed such information as would have had a material bearing on whether to grant him a visa, as the District Court so found, his entry into the United States was in accordance with the laws then in effect. Since Congress expressly assured him that his admissibility shall be determined on the basis of the laws *then* in effect, how can the Government plausibly argue that Congress, by its silence in 1961, could retroactively convert his lawful entry in 1948 into an "illegally procured" entry in 1987 based upon misrepresentations judicially found to be immaterial and found to have had no effect whatsoever on the issuance of his visa?

In view of its findings that none of petitioner's representations was material and that "illegally procured" overlapped the material fact requirement of Section 1451 (a) even after such amendment, the District Court concluded it was "unnecessary" to address petitioner's argument the 1961 Amendment could not apply to him. The District indicated its awareness that the Third Circuit in *United States v. Riela*, 337 F.2d 986, 989 (CA 3 1964) directed that, "The legality of the defendant's naturalization must be determined under the applicable provisions of the statute as they were at the time of his admission to citizenship" (Pet.App. C, 124a). -The Third Circuit herein failed to opine on the applicability of the "illegally procured" amendment, presumably because it agreed with the District Court's ruling that the Government cannot avoid

the "material fact" requirement of a denaturalization proceeding by resort to Section 1101(f)(6). For further amplification as to why the 1961 "illegally procured" amendment cannot constitutionally be applied retroactively to petitioner, see Petitioner's Reply Brief to the Brief of the United States, 16-20.

II. THE CHAUNT "MATERIALITY" HOLDING REQUIRES PROOF OF AN ULTIMATE DISQUALIFYING FACT

The Government asserts that this Court in *Chaunt* concluded that the Government is not required to prove an ultimate disqualifying fact to establish materiality under the alternative approach because of the use of the words "might" and "possibly" in Justice Douglas' opinion (Supp. Gov't Br., 22-26). Since Chaunt retained his naturalized citizenship despite having falsely denied he had ever been arrested and since those arrests "might" have involved distributing literature and making speeches "possibly" showing his activities as a district organizer for the Communist Party in Connecticut, it is puzzling as to how the Government can still argue that the holding of *Chaunt* "strongly suggests that proof of an ultimate disqualifying fact is not required" (Supp. Gov't Br., 23). Despite the Government's proof of Chaunt's false denial of his arrests, that was not deemed by this Court to prove lack of good moral character because the "totality of circumstances" surrounding the arrests showed they did not involve "moral turpitude", but instead involved matters of "extremely slight consequences." *Chaunt v. United States*, *supra* at 353-354. This Court thus refused "to base materiality on the tenuous line of investigation that might have led from the arrests to the alleged communistic affiliation . . ." (*id.*, at 354-355).

So too in the instant case the petitioner's false date and place of birth are of "extremely slight consequences" and do not "involve moral turpitude within the meaning of the law." (*id.* at 353). As in *Chaunt*, "While disclosure of them was properly exacted, the arrests [misrepresentations of date and place of birth] were not reflections on the character of the man seeking citizenship" (*Ibid*) (brackets added). There, as here, "On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of 'clear, unequivocal, and convincing' evidence that naturalization was illegally procured within the meaning of § 340(a) of the Immigration and Nationality Act" (*id.*, at 354).

The Government failed in its attempt to denaturalize Chaunt because it did not prove by clear, unequivocal and convincing evidence either that the disclosure of his arrests would have warranted denial of citizenship or that their disclosure "might" have been useful in an investigation "possibly" leading to the discovery of other facts warranting denial of citizenship. The ultimate fact that the Government failed to prove was Chaunt's lack of intent to renounce foreign allegiance. The false denial of arrests which "might" have shown "possible" Communist affiliation was too tenuous to link Chaunt to the requisite ultimate disqualifying fact of lack of intent to renounce foreign allegiance.

If there was any post-*Chaunt* doubt that the "material fact" requirement of the denaturalization statute requires proof of an ultimate disqualifying fact no matter how approached, that doubt should have been dispelled by each of the opinions of this Court in *Fedorenko*. Although the majority affirmed the judgment, it expressly rejected the

rationale of the Court of Appeals that the "might" or "possibly" language of *Chaunt* dispensed with the requirement to prove an ultimate fact warranting denial of citizenship (*id.*, at 504 n.22) in stating, "We affirm, but for reasons which differ from those stated by the Court of Appeals." (*id.*, at 505). The majority held that if Fedorenko had disclosed his prior status as a concentration camp guard, that fact would have made him ineligible for a visa and thus failure to disclose that disqualifying fact made his citizenship illegally procured (*id.*, at 509). Certainly, Justice Blackmun left no doubt as to his analysis of *Chaunt* and the cases prior thereto, which the Government also misconstrued, when he opined, "Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its 'two tests' are simply two methods by which the existence of ultimate disqualifying facts might be proved" (*id.*, at 524). So too, Justice Stevens left no doubt as to what proof is required when he unequivocally opined, "Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated" (*id.*, at 537).

In view of this Court permitting Chaunt to retain his citizenship despite his false denial of having been arrested, it is submitted that the "sounder construction" of the word "possibly", if there is to be an alternative approach to finding materiality, is that adopted by the District Court in *Fedorenko*, 455 F. Supp. 893, 915-916 (S.D. Fla. 1978) and as explained by Justice Blackmun, to wit, "Because, what would 'possibly' be discovered is not 'facts which might warrant denial of citizenship' but 'other facts war-

ranting denial of citizenship' (emphasis [there] supplied), the 'second test' simply asks whether knowledge of the suppressed facts could have enabled the Government to reach the ultimate disqualifying facts whose existence is now known" (*id.*, at 524 n.13). That explanation by Justice Blackmun is consistent with Justice Douglas' first expression of the alternative approach which did not contain the words "possibly" or "useful" (See 364 U.S. at 353—"disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship").

However expressed in *Chaunt* and *Fedorenko*, it should be clear to the Government that the alternative approach to proving materiality still requires proof of the actual existence of an independent, ultimate disqualifying fact. The only real difference between the first approach and the alternative approach to proving materiality is whether the disqualifying fact is the fact misrepresented or concealed in the immigration papers or is the independent fact whose existence is directly linked to the failure to disclose the truth of the misrepresented fact.

If there still is to be an alternative approach to proving materiality, what needs clarification is the level of proof needed to connect the suppressed fact to the independent, ultimate disqualifying fact. In his dissent in *Fedorenko*, Justice White appeared to require such linkage when he stated, "The Government should be required to prove that an investigation would have occurred if a truthful response had been given . . ." (*id.*, at 528 n.8), and yet he appeared to prefer creating a rebuttable presumption as to what other facts such an investigation might have uncovered, in stating, "The defendant could rebut the Government's showing that the investigation might have

led to the discovery of facts justifying denial of citizenship by establishing that the underlying facts would not have justified denial of citizenship" (*Ibid*).

At the trial the Government realized it had to establish an ultimate disqualifying fact and attempted to do so through the false testimony of former Vice Consul Seymour Finger that the regulations then in effect required the applicant to be a victim of Nazi persecution in order to be eligible for a non-preference quota immigration visa (J.A. 218, 227-228). Petitioner rebutted that testimony by putting in evidence the actual regulation then in effect [22 C.F.R. § 61.313(a)(3)(i)(c)] and the Presidential Directive of December 22, 1945 as to displaced persons incorporated into that regulation (Pet.App. E, 141a; Pet. App. F, 143a-151a). Neither contained any such requirement and the District Court genteely found that Mr. Finger was "in error" (Pet.App. C, 120a n.7). At the trial, the Government admitted they were unable to produce any such regulation (Lodging, R. 1298), and at the first oral argument before this Court the Government conceded that no such regulation ever existed in disclosing, "We concede there's no statute or regulation" (TR Oral Argument 35).

Lacking proof of any disqualifying fact, the Government has resorted to asserting erroneously that *Chaunt* and its predecessors dispensed with the requirement that the Government establish materiality by proving an ultimate disqualifying fact (Supp. Gov't Br. 22-26). The Government's Supplemental Brief on that Point II.A enigmatically is silent as to *Fedorenko* and its citation with approval at 509 to the post-*Chaunt* opinion of *United States v. Rossi*, 299 F.2d 650, 652 (CA 9 1962) for the principle that, "It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms

of its effect on the applicant's admissibility into this country."

**A. IT WOULD BE AN UNWARRANTED
OVERSIMPLIFICATION TO DILUTE THE
MATERIALITY REQUIREMENT MERE-
LY TO MEAN EITHER "A NATURAL
TENDENCY TO INFLUENCE" OR "CAP-
ABLE OF INFLUENCING"**

Although it appears settled that however proof of a material fact is approached it still requires the existence of a disqualifying fact, the Government also seeks to dilute "material fact" in the denaturalization statute by re-defining it with the twin definition; (1) "a natural tendency to influence"; or (2) "was capable of influencing" the tribunal or governmental official (Supp. Gov't Br. 24-30). Although expressed in two different ways the Government argues that both are the "ordinary meaning" Congress intended and are the way the adjective "material" is treated in the perjury and false statement criminal cases in some circuits. Yet, nowhere in the legislative history of the denaturalization statute or any amendment thereto is there any reference to any Congressional intent to incorporate the definition of "material" from any other statute or from certain cases involving criminal prosecution for false swearing or perjury.

The "ordinary meaning" of "material fact" found in Webster's Dictionary is "having real importance or great consequences", as in "facts material to the investigation" (Webster's New Collegiate Dictionary, 1977). The "ordinary meaning" of "material" found in Black's Law Dictionary is "Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form", and the "ordinary meaning" of "material fact" is defined for contracts as

“One which constitutes substantially the consideration of the contract, or without which it would not have been made”, and for pleading and practice as “One which is essential to the case, defense, application, etc. and without which it could not be supported” (1968 edition of Black’s Law Dictionary, p.1128). It seems reasonably obvious that the “ordinary meaning” of the adjective “material” when used to modify “fact” in the context of the kind of misrepresentation that citizenship was “procured by” is that it requires that the “fact” misrepresented be of such “importance” that, but for its being misrepresented, citizenship would not have been procured thereby.

Requiring a “material fact” to be outcome determinative is fully consistent with what this Court held in *Schneiderman, Costello, Chaunt and Fedorenko* and how this Court analyzed “material fact” in *Anderson v. Liberty Lobby, Inc.*, 475 U.S. — (1986). The Government’s proposed redefinitions of material fact as a mere tendency or capacity to influence are equivalent to revising the denaturalization statute to be satisfied by proof of mere possibly “relevant” facts, as distinct from “material” or outcome determinative facts. Such diluted revisions of the denaturalization statute would involve a degree of speculation and would be inconsistent with the firmly entrenched, “unequivocal” denaturalization evidentiary standard enunciated in *Schneiderman* which Congress intended to survive the revisions of the 1952 Immigration and Nationality Act (See Appendix to Petitioner’s Reply Brief, 1a-2a). That which merely has a tendency or capacity to influence does not unequivocally establish that the truth of the undisclosed fact would clearly have caused the immigration official to deny a visa application or reject a petition for citizenship. Indeed, at the trial in *Fedorenko* the immigration examiner testified that the

prior falsification of his birthplace in his visa application was "not a cause for concern" at the citizenship stage (*Fedorenko, supra*, at 503 n.21).

III. ONLY UNWARRANTED JUDICIAL REVISION COULD CHANGE THE CAUSAL "PROCURED BY" REQUIREMENT OF SECTION 1451(a) TO A SELF OBVIOUS DESCRIPTION THAT THE MATERIAL REPRESENTATION OR CONCEALMENT TO OBTAIN CITIZENSHIP HAD TO HAVE BEEN MADE "IN THE COURSE OF" THE VISA OR NATURALIZATION PROCEEDINGS

The Government seeks to avoid the denaturalization statutory requirement that there be a cause and effect relationship between the material fact misrepresented and the citizenship thereby procured. The Government does so by revising the plain statutory language "procured by concealment of a material fact or by willful misrepresentation" to read that everyone should be denaturalized who "obtained citizenship *after* concealing a material fact or making a willful misrepresentation *in the process* of procuring a visa or citizenship" (Supp. Gov't Br. 30-33) (emphasis added). One would ask the Government where else would a misrepresentation in obtaining citizenship be made other than "in the process of" procuring a visa or citizenship; and when else would citizenship be obtained then *after* such a misrepresentation had been made? There is no justification for the Government's unwarranted revision of the "but for" or casual requirement embodied in "procured by" into an oversimplified sequential occurrence that the acquisition of citizenship merely follows the making of the misrepresentation, thereby converting "procured by" into "procured in the process". It is false logic to argue *post hoc* equals *propter hoc*.

As demonstrated *supra*, the Government is simply wrong in its further argument that "illegally procured or procured by" would make the first phrase redundant instead of simply overlapping. For a sounder analysis of the "procured by" requirement of the denaturalization statute which is consistent with this Court's actual materiality holdings in *Chaunt*, *Fedorenko* and *Schneiderman*, see Supp. Br. of Pet. on Reargument, 26-29.

Taking the Government's arguments as a whole would require totally revising the denaturalization statute to read every immigrant shall be denaturalized who "obtained citizenship after concealing in the process of procuring a visa or citizenship any fact; or, if not any fact, any fact which had a natural tendency to influence or was capable of influencing a government official, even if there is no proof that, if the fact had been disclosed, it would have influenced the official; or, even if it had no such tendency or capacity, if such a concealed fact might have been useful or, even if not useful to an investigation, if there was any possibility an investigation might have led to other facts having a tendency to be of interest, irrespective of whether those possible other facts constituted ultimate disqualifying facts." The Government would thus have the courts worship the bureaucratic process of immigration as a god in itself, even if the substance was innocuous or immaterial. If that were to become the standard then any question the Government puts on an immigration form thereby becomes "material". As Justice Blackmun indicated in *Fedorenko*, "I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt*." (*supra*, at 524).

When all else fails the Government falls back on its repeated paean that giving "procured by" its plain, "but-for" meaning would make Section 1451(a) a license to lie

in applications for citizenship. If that were the case, then the Government could always argue that whenever Congress imposed a legal requirement in addition to the making of the false statement, such as proof of materiality in the perjury and false swearing statutes, it is a license to encourage witnesses to lie in court or before grand juries. The deterrent to all citizens for false swearing is fine and imprisonment. As this Court observed in *Fedorenko*,

“*Chaunt’s* rigorous definition of materiality, it is true may occasionally benefit an applicant who conceals disqualifying information. Yet, practically and constitutionally, naturalized citizens as a class are not less trustworthy or reliable than the native born. The procedural protection of the high standard of proof is necessary to assure the naturalized citizen his right, equally with the native born, to enjoy the benefits of citizenship in confidence and without fear” (*supra*, at 525 n.14).

Respectfully submitted,

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August, 1987

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No. 86-228

JOSEPH F. SPANIOL, JR.
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1987

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES ON REARGUMENT

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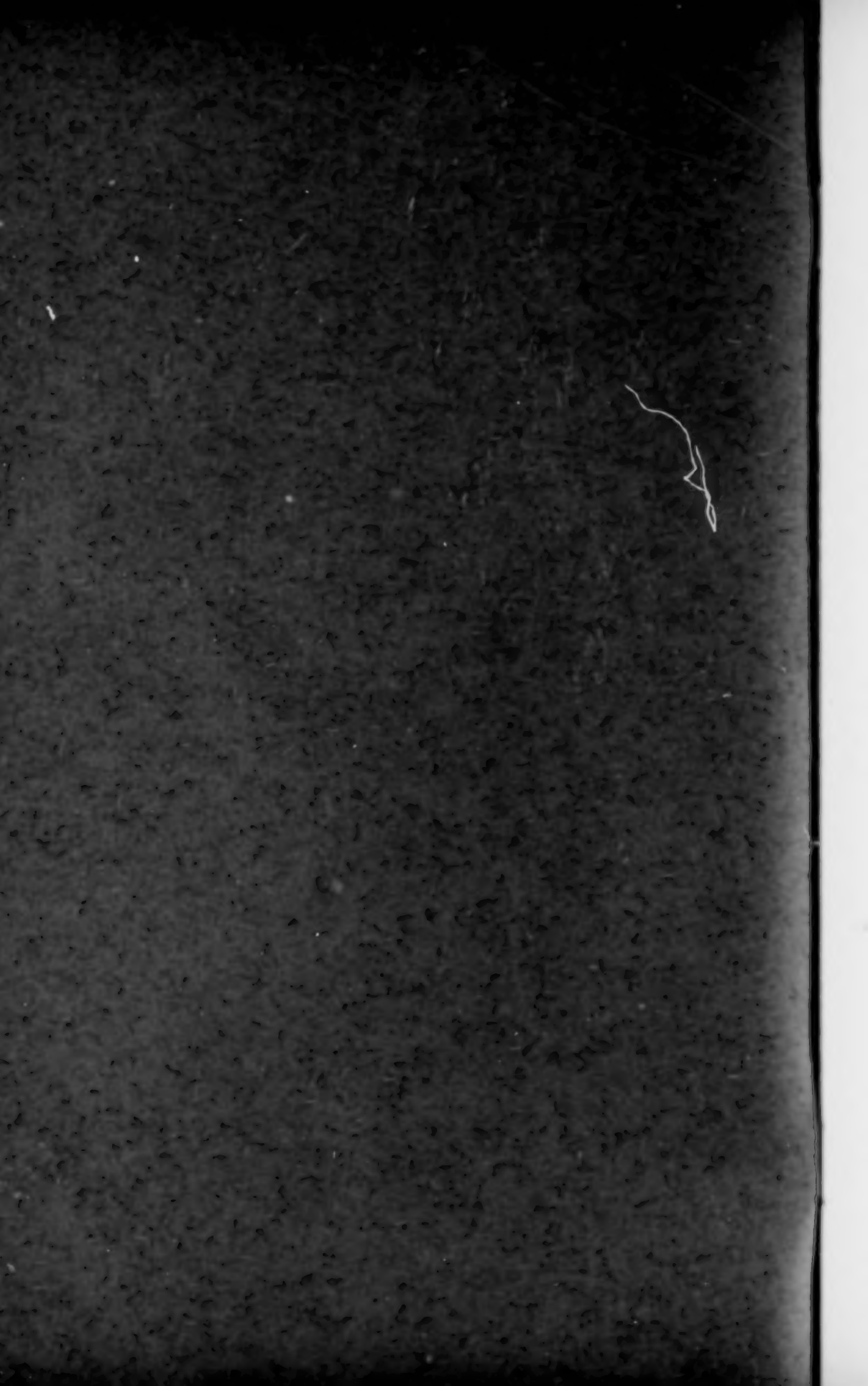


TABLE OF AUTHORITIES

Page

Cases:

<i>Anderson v. Liberty Lobby, Inc.</i> , No. 84-1602 (June 25, 1986)	10
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960)	4
<i>Costello v. United States</i> , 365 U.S. 265 (1961)	4
<i>Del Guercio v. Pupko</i> , 160 F.2d 799 (9th Cir. 1947)	6
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981)	4
<i>Klapprott v. United States</i> , 335 U.S. 601 (1949)	4
<i>Luria v. United States</i> , 231 U.S. 9 (1913)	3, 6
<i>Russello v. United States</i> , 464 U.S. 16 (1983)	2-3
<i>S- and B-C-, In re</i> , 9 I. & N. Dec. 444 (1961)	9
<i>Stevens v. United States</i> , 190 F.2d 880 (7th Cir. 1951)	6
<i>United States v. Accardo</i> , 113 F. Supp. 783 (D.N.J.), aff'd, 208 F.2d 632 (3d Cir. 1953), cert. denied, 347 U.S. 952 (1954)	7
<i>United States v. Forrest</i> , 69 F. Supp. 389 (D.R.I. 1946) ..	6
<i>United States v. Harrison</i> , 180 F.2d 981 (9th Cir. 1950) ..	6
<i>United States v. Kairys</i> , 782 F.2d 1374 (7th Cir.), cert. denied, 476 U.S. 1153 (1986)	3
<i>United States v. Sheshtawy</i> , 714 F.2d 1038 (10th Cir. 1983)	11

Statutes:

Immigration Act of 1924, ch. 190, 43 Stat. 153:	
§ 2(f), 43 Stat. 154	6-7
§ 7, 43 Stat. 156	7
§ 7(b), 43 Stat. 156	5, 7
Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 et seq.:	
8 U.S.C. 1101(f)	4
8 U.S.C. 1101(f)(6)	1, 2, 3, 5, 6
8 U.S.C. 1101(f)(8)	5
8 U.S.C. 1101 note	6
8 U.S.C. 1182(a)(19)	2
8 U.S.C. 1427(a)	5, 6
8 U.S.C. 1451(a)	2, 3, 4, 7, 8, 9, 10, 11



In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-228

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES ON REARGUMENT

1. Petitioner maintains (Pet. Supp. Br. 8-15) that he is not subject to denaturalization for want of good moral character. He offers a variety of statutory and constitutional arguments, all of which lack merit.

a. Petitioner's principal assertion (Pet. Supp. Br. 9) is that under 8 U.S.C. 1101(f)(6), false testimony must be material in order to warrant denaturalization. He attempts to derive a materiality requirement from the provision in Section 1101(f)(6) requiring that false testimony must have been given "for the purpose of obtaining any benefits under [the immigration laws]." According to petitioner (Pet. Supp. Br. 9), that provision "is at least the functional equivalent of requiring that the false testimony concern a fact material to obtaining an immigration benefit."

While we agree with petitioner (Gov't Supp. Br. 12) that the "purpose of obtaining [immigration] benefits" language in Section 1101(f)(6) constitutes an important element that the government must satisfy to establish lack of good moral character, we disagree with his claim that

that language imposes a requirement of materiality. Section 1101(f)(6) is concerned with moral character. The relevant inquiry under that provision is therefore whether the visa or citizenship applicant had the wrongful intent to deceive the government in order to obtain immigration benefits. In contrast, the misrepresentation clause of Section 1451(a) is concerned with information gathering, and the focus of that provision is therefore on the importance of the false statement to the decisionmaker. It is for that reason that Section 1451(a) requires that a false statement be material, while Section 1101(f)(6) requires that the statement be given with the intent to deceive.

While there may be substantial overlap in many instances, the difference between the two provisions can be important. For example, a person may have willfully given false material testimony but may not have done so with an intent to obtain immigration benefits. That testimony would satisfy the misrepresentation clause of Section 1451(a), but it would not satisfy Section 1101(f)(6). Conversely, a person may have erroneously believed that a certain fact was relevant and may have deliberately given false testimony about it in order to obtain immigration benefits. Section 1101(f)(6) *would* apply in such a case, regardless of whether the fact was material.

Besides the differing purposes served by Sections 1101(f)(6) and 1451(a), the difference in language clearly signals an intent on the part of Congress to impose different proof requirements under each provision. If Congress had intended to impose a materiality requirement in enacting Section 1101(f)(6), it presumably would have used the word "material," as it did in Section 1451(a), as well as in other places in the statute (e.g., 8 U.S.C. 1182(a)(19)), instead of using the much longer phrase "for the purpose of obtaining any benefits under this chapter." See generally *Russello v. United States*, 464 U.S. 16, 23

(1983) (refusing to attach the same meaning to two different phrases in a statute).¹

b. Petitioner also argues (Pet. Supp. Br. 10) that denaturalization under Section 1101(f)(6) based on false testimony would be unconstitutional, because "native born citizens would be subject only to fine and imprisonment" for similar conduct. That claim, which petitioner raises for the first time in his supplemental brief, is totally without merit. There is nothing unconstitutional about denaturalizing a person for misrepresentation or illegal procurement, since the government is simply taking away something that, in light of the person's pre-citizenship conduct, was never rightfully his. See *Luria v. United States*, 231 U.S. 9, 24 (1913). As one court recently noted, "the differences in treatment [between naturalized and native citizens] is due to the inherent differences in the two types of citizenship; for natives there are no pre-citizenship acts to prescribe." *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir.), cert. denied, 476 U.S. 1153 (1986).

If petitioner were correct, then *all* denaturalizations under Section 1451(a) would be unconstitutional. Yet this Court has never suggested that there is anything unconstitutional about subjecting only naturalized citizens

¹ The Baltic-Ukrainian-American Compact, et al. [hereinafter amici] appear to recognize the difference between materiality and a "purpose of obtaining [immigration] benefits," but they argue that *both* elements of proof should be required in a denaturalization action based on Section 1101(f)(6) (Amici Br. 34-35). As we have explained, however (Gov't Supp. Br. 5-15), the text and history of Section 1101(f)(6) simply do not support reading a materiality requirement into the statute.

In addition, both petitioner (Pet. Supp. Br. 14) and amici (Amici Br. 35) contend that the government failed to prove that petitioner's lies were for the purpose of obtaining immigration benefits. However, both briefs ignore the district court's specific finding against petitioner on that point (see Pet. App. 120a).

to loss of citizenship under Section 1451(a).² Indeed, the Court's cases make clear that the opposite is true. For example, in *Costello v. United States*, 365 U.S. 265 (1961), the Court upheld the denaturalization of a person who concealed his occupation as a bootlegger. Obviously, a native-born citizen would not lose his citizenship for having engaged in such activity. Similarly, if petitioner were correct, this Court should not have upheld the denaturalization of Feodor Fedorenko (see *Fedorenko v. United States*, 449 U.S. 490 (1981)). And the entire underlying premise of *Chaunt v. United States*, 364 U.S. 350 (1960)—that the government can denaturalize someone if the requirements of Section 1451(a) are met—would be erroneous. In short, there is no constitutional impediment to denaturalizing a person who obtained his citizenship without possessing the requisite good moral character.³

c. Petitioner also contends (Pet. Supp. Br. 10) that he cannot be denaturalized for want of good moral character because “[t]here was no warning or any notice that subse-

² Petitioner cites *Klapprott v. United States*, 335 U.S. 601, 619 (1949), to support his contention (Pet. Supp. Br. 10). But the page cited by petitioner is from Justice Rutledge's concurring opinion. Justice Rutledge explicitly recognized that his view—that a naturalized citizen should not be able to lose his citizenship for reasons that do not apply to native-born citizens—“ha[s] not prevailed here” (335 U.S. at 617; see also *id.* at 619).

³ There is likewise no merit to petitioner's claim (Pet. Supp. Br. 10) that lack of good moral character is not a statutory basis for denaturalization. Petitioner fails to note that a person who lacked good moral character at the time of his naturalization is deemed to have procured his citizenship illegally. See Section 1451(a); *Fedorenko*, 449 U.S. at 515 (failure to satisfy a statutory prerequisite to citizenship justifies revocation of that citizenship on the ground of illegal procurement). Congress in 1961 restored illegal procurement as a ground for denaturalization with the specific purpose of enabling the government to denaturalize persons who obtained citizenship without possessing the requisite good moral character, as defined in Section 1101(f) (see Gov't Supp. Br. 11).

quently obtained citizenship could be revoked on the basis of lack of good moral character for making any false statement." His argument, apparently, is that he believed that he could freely lie, with no consequences, about basic biographical facts as long as those facts were not material.

In the first place, the issue of notice is irrelevant; the only issue is whether a person possessed the requisite qualifications for citizenship at the time he was awarded that privilege. It cannot seriously be suggested, for example, that someone who had been convicted of murder prior to obtaining citizenship—and who therefore lacked good moral character (see 8 U.S.C. 1101(f)(8))—cannot be denaturalized unless he knew, at the time he applied for citizenship, that murderers were not entitled to that benefit. Similarly, whether petitioner knew that he could be denaturalized for giving false testimony to immigration authorities is not relevant.

In any event, petitioner was clearly on notice that any lies he told were at his own peril. While petitioner dismisses his lies as "innocuous" and "trivial" (Pet. Supp. Br. 42), those lies related to the very facts that Congress explicitly required a visa applicant to disclose, namely, his date and place of birth. See Immigration Act of 1924, ch. 190, § 7(b), 43 Stat. 156. Indeed, at the time petitioner applied for his visa, misrepresentations concerning identity were viewed by many courts as material per se. See Gov't Br. 30-31 n.28 (citing cases). Moreover, petitioner's application for citizenship warned him about the importance of telling the truth (J.A. 42). And in 1953, when petitioner applied for citizenship, the law was clear (as it is today) that (1) no person was entitled to naturalization if he lacked good moral character (8 U.S.C. 1427(a)), and (2) no one was entitled to claim that he possessed good moral character if he had given false testimony for the purpose of obtaining immigration benefits (Section 1101(f)(6)).⁴

⁴ Although illegal procurement did not exist as a ground for denaturalization between 1952 and 1961 (see Gov't Br. 47 n.48), it

In addition, in the years prior to petitioner's naturalization, a number of courts had held, without even addressing the issue of materiality, that giving false testimony evidenced bad moral character. See, e.g., *Stevens v. United States*, 190 F.2d 880, 881 (7th Cir. 1951); *United States v. Harrison*, 180 F.2d 981, 983 (9th Cir. 1950); *Del Guercio v. Pupko*, 160 F.2d 799, 800 (9th Cir. 1947); see also *United States v. Forrest*, 69 F. Supp. 389, 390-391 (D.R.I. 1946) (ordering denaturalization because of false testimony); Gov't Br. 46 (citing cases).⁵ Petitioner could

would have been unreasonable for petitioner to have concluded that if he managed to obtain citizenship without possessing the necessary qualifications, the government would be powerless to act. In 1948, when petitioner declared his intention to become an American citizen, illegal procurement was still a basis for denaturalization (see *ibid.*). Moreover, as we have explained (Gov't Br. 47-48 n.48), Congress intended that the illegal procurement provision be applied retroactively, and retroactive application of that provision does not offend the Constitution. The government is "not mak[ing] any act fraudulent or illegal that was honest or legal when done" (*Luria*, 231 U.S. at 24), since at the time petitioner applied for citizenship, no applicant was eligible if he had given false testimony for the purpose of obtaining immigration benefits (8 U.S.C. 1101(f)(6), 1427(a)).

⁵ Petitioner states that at the time he entered this country, a misrepresentation justified refusal of a visa or exclusion only if it related to an ultimate disqualifying fact (Pet. Supp. Br. 14 (citing cases)). But petitioner ignores the cases holding that lies relating to identity were deemed material per se and that false testimony demonstrated lack of good moral character.

Petitioner similarly errs in relying for support on the savings clause in the 1952 immigration statute (Pet. Supp. Br. 11 (quoting 8 U.S.C. 1101 note)). That clause merely states, in relevant part, that a visa or other immigration document that was valid prior to the enactment of the 1952 statute would remain valid after that enactment. Petitioner's naturalization occurred under the 1952 statute — not prior to the enactment of that statute — so the savings clause has no bearing on the false testimony he gave in 1953 in connection with his naturalization proceedings. Moreover, petitioner is in no position to assert the purported validity of his visa. Section 2(f) of the 1924 Act provided that a

not reasonably have believed that he could lie under oath about his date of birth, place of birth, wartime residence, and wartime occupation, yet face no risk of denaturalization.⁶

2. With respect to the material misrepresentation clause of Section 1451(a), petitioner asserts (Pet. Supp. Br. 20) that the government cannot establish the materiality of a false statement unless the government proves an ultimate disqualifying fact. Petitioner appears to concede, as he has previously, that the literal language of the second *Chaunt* test supports the materiality test urged by the government (Pet. Supp. Br. 16-17, 24; see also Pet. 8; Oral Arg. Tr. 4). He contends, however, that "[the] Court is not bound by the *dicta* in *Chaunt*" and that it should "reject or

visa applicant must comply with the provisions of that Act (43 Stat. 154), and Section 7(b) provided that the applicant must state his date and place of birth (43 Stat. 156). Petitioner plainly did not comply with Section 7. The government's position throughout this case has been that because of his false statements, petitioner's visa was never valid.

⁶ Ironically, one of the leading cases holding that a person giving false testimony can be denaturalized for want of good moral character was rendered in the very district where petitioner later obtained his citizenship. Petitioner submitted his petition for naturalization in the district court of New Jersey on October 23, 1953 (Pet. App. 44a; J.A. 48). Three months earlier, on July 10, 1953, that same court had issued a published decision ordering the denaturalization of a person for lying about his criminal background. *United States v. Accardo*, 113 F. Supp. 783, 786 (D.N.J.), *aff'd* on opinion below, 208 F.2d 632 (3d Cir. 1953), *cert. denied*, 347 U.S. 952 (1954). The court reasoned that by lying, the person had demonstrated a lack of good moral character (113 F. Supp. at 786). In reaching its decision, the court asked (*ibid.*): "How can a person claim to be of 'good moral character' . . . at the very time he is seeking to defraud the United States, in a matter of moment both to him and to the country?" In light of that decision, no applicant for citizenship in the district court of New Jersey in October 1953 could have felt secure in lying to immigration officials.

abandon [that] *dicta*" in favor of a standard that requires proof of a disqualifying fact (Pet. Supp. Br. 16-17 (emphasis in original)). This Court should reject petitioner's invitation.⁷

a. The most notable feature of petitioner's argument is that, as in all of his previous briefs, petitioner totally fails to explain how, if proof of an ultimate disqualifying fact were required, the misrepresentation clause of Section 1451(a) would have any meaning. As we have indicated (Gov't Br. 23-24), if the government proves an ultimate disqualifying fact, it has thereby established illegal procurement, and the misrepresentation provision becomes redundant. Petitioner also fails to respond to the serious problem that, under his proposed standard, an applicant for a visa or citizenship would have no incentive to tell the truth if he believed that any information about his past could adversely affect his application (see *id.* at 22-23).

Furthermore, the reasons given by petitioner in support of his proposed standard do not withstand scrutiny. His principal contention (Pet. Supp. Br. 17) is that unless proof of an ultimate disqualifying fact is required, the government's burden will be inconsistent "with the rigorous burden of proof [in denaturalization cases] by evidence that is clear, unequivocal and convincing (leaving no issue of law or fact in doubt)." That argument confuses the burden of proof with the test for materiality.

In a perjury prosecution, for example, the government must prove its case beyond a reasonable doubt. Yet, as we have noted (Gov't Br. 25-27), the applicable materiality test in perjury cases is simply whether the false statement had a natural tendency to influence, or was capable of influencing, the tribunal or official. No one would seriously

⁷ Petitioner's characterization of the second *Chaunt* test as dictum is incorrect. To find that the failure to disclose the arrests was immaterial, the *Chaunt* Court had to find that the arrests were not material even under the most lenient materiality standard, *i.e.*, the second prong of the test.

suggest that by applying that materiality test in perjury prosecutions, the courts have somehow diluted the burden of proof in criminal cases. That same analysis applies *a fortiori* under Section 1451(a); adoption of the criminal materiality standard, as we have urged (Gov't Supp. Br. 26-30), would not dilute the "clear, unequivocal, and convincing evidence" standard. In short, petitioner's reference to the burden of proof in denaturalization cases is not helpful in resolving the materiality issue.⁸

Petitioner further errs in relying for support on a submission by then-Deputy Attorney General White to the House Judiciary Committee in 1961 (Pet. Supp. Br. 19; see also Pet. Reply Br. App. 1a-3a). That submission merely stated that the Justice Department opposed lowering the burden of proof in denaturalization actions from "clear, unequivocal, and convincing evidence" to a "preponderance of the evidence" (*id.* at 1a-2a). Petitioner erroneously suggests that the government's present position is "in extreme contrast to, and a radical departure from," the one taken in 1961 (Pet. Supp. Br. 19). The government in the present case is in no way suggesting that the "clear, unequivocal, and convincing" standard of proof in denaturalization actions be lowered. By the same token, the Justice Department in 1961 was not even addressing the issue of materiality, let alone urging a standard that requires proof of an ultimate disqualifying fact. Indeed, in October 1961—four months after the submission to the Judiciary Committee—the Attorney General issued a ruling adopting a materiality standard that is entirely consistent with the one proposed by the government here. See *In re S- and B-C-*, 9 I. & N. Dec. 444, 447 (1961).

⁸ Petitioner makes much of the fact that the government at one time charged him with lying about his marital status (Pet. Supp. Br. 20-23). When the government learned the true facts, however, it promptly sought and obtained dismissal of that charge well in advance of trial (C.A. App. 1A (docket entry 102), 172, 176). Those events have no bearing on the issues before the Court.

Nor does petitioner advance his position by relying on this Court's decision in *Anderson v. Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986) (see Pet. Supp. Br. 20, 28). In *Liberty Lobby*, the Court held that the court of appeals applied an erroneous standard in reviewing the district court's grant of summary judgment in a libel suit brought by public figures. To the extent that the case is relevant at all, it undermines petitioner's position. In discussing when an issue of fact is sufficiently material to preclude summary judgment, the Court stated that "[o]nly disputes over facts that *might* affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment" (slip op. 5 (emphasis added) (quoted in Pet. Supp. Br. 28)). The Court then explained (slip op. 5) that "[the] materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard [clear and convincing evidence] into the summary judgment determination." Thus, *Liberty Lobby* supports the view that materiality does *not* require a definitive fact but only one that "might" affect the outcome. Moreover, the case demonstrates that the issue of materiality is distinct from that of the applicable burden of proof.

b. Petitioner also attempts to derive support for his proposed materiality standard by relying on the phrase "procured by" in Section 1451(a) (Pet. Supp. Br. 20, 23-24, 26-28, 31). Although he has not previously emphasized that language during this litigation, he now takes the government to task for ignoring Congress's "unambiguous" language and intent (*id.* at 27).

As we explained, however (Gov't Supp. Br. 30-31), the purpose of the "procured by" language is simply to make clear that the material misstatements or concealments must have been made during the process of applying for a visa or citizenship. As we noted (*id.* at 31-32), reading that language as requiring proof of causation would make the

word "material" redundant, since a false statement that caused the granting of a visa or citizenship would necessarily be "material" under any definition of that term. Indeed, petitioner's reading of "procured by" would render the entire misrepresentation clause of Section 1451(a) redundant, since the government would be required to show illegal procurement in every case. Congress could not have intended, by using the language "procured by," to nullify the very clause in which that language appears.

Significantly, while petitioner now relies on the "procured by" language, he fails to cite a single case that has attached significance to that phrase. Nor can he explain why, if that language is so clear, the courts interpreting Section 1451(a)—both prior to and subsequent to *Chaunt*—have almost universally held that proof of an ultimate disqualifying fact is not required. Even the Tenth Circuit in *United States v. Sheshtawy*, 714 F.2d 1038 (1983), which held that proof of an ultimate disqualifying fact is required, did not rely upon the "procured by" language. In short, petitioner offers nothing to undermine our submission that when a misrepresentation has been established as "material" within the meaning of 8 U.S.C. 1451(a), the government can establish that citizenship was "procured by" that misrepresentation if it shows that the misrepresentation was made during the process leading to the entry of an order of naturalization.

3. In addition to addressing the issues raised by the Court in its order of June 26, 1987, petitioner and amici raise several other points that require only brief response.

First, petitioner reiterates his argument that the court of appeals improperly overturned the district court's finding that the lies at issue were not material (Pet. Supp. Br. 32-36). In the first place, as we explained (Gov't Supp. Br. 21 & n.12, 30), the ultimate issue of materiality is one of law; the court of appeals was thus not bound by the clearly

erroneous standard on that question. Moreover, as we discussed (Gov't Br. 33-34), the court of appeals did not disagree with any factual findings made by the district court. Rather, the court in essence found that the district court erred in not considering whether *discrepancies* between true information and previously submitted false information would have had an impact on the immigration and naturalization proceedings.

Second, both petitioner (Pet. Supp. Br. 38-42) and amici (Amici Br. 8-20) argue at length that the Soviet-source deposition evidence introduced by the government was unreliable. While we disagree with that contention for the reasons we explained in the court of appeals (Gov't C.A. Br. 29-56), that issue is not before this Court. The district court admitted the depositions solely to establish that the atrocities in Kedainiai occurred (Pet. App. 108a). And while the court of appeals questioned the premise that Soviet evidence should be automatically excluded (*id.* at 6a n.2), it did not ultimately reach the government's claim that the district court erred in restricting the admissibility of the evidence (*id.* at 6a).

Third, amici suggest (Amici Br. 20-25) that petitioner's reason for lying may have been to avoid repatriation to the Soviet Union. But that explanation does not square with the facts of this case. To this day petitioner has refused to admit that he lived in Kedainiai at the time the atrocities occurred there. And as to those lies that he now admits, his explanation is that he acted out of fear of the Germans, not because he feared being returned to Lithuania (see Gov't Br. 46-47 n.47).

Finally, amici (Amici Br. 27-28, 30-32) reiterate petitioner's assertion (Pet. 12; Pet. Reply Br. 20) that an order of denaturalization in this case is essentially a death sentence. As we have explained, however (Gov't Br. 2 n.3), a denaturalization order is simply the initial step leading to possible deportation, and the ultimate outcome of any

subsequent deportation proceedings is not at all preordained by the outcome of this denaturalization suit. As amici themselves note (Amici Br. 25-26), the district court did not find petitioner to be a Nazi war criminal. Accordingly, petitioner could be eligible in deportation proceedings to claim various forms of discretionary relief from deportation that are not available to war criminals (see Gov't Br. 2 n.3). And the district court's finding may enable petitioner to find a country other than the Soviet Union that is willing to accept him. In short, amici's assertion (Amici Br. 27-28) that petitioner "faces almost certain death" is unfounded.

For the foregoing reasons and those stated in our initial and supplemental briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STEPHEN P. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JUOZAS KUNGYS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**MOTION FOR LEAVE TO FILE AND
BRIEF OF THE BALTIC-UKRAINIAN-AMERICAN
COMPACT, ET AL., AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

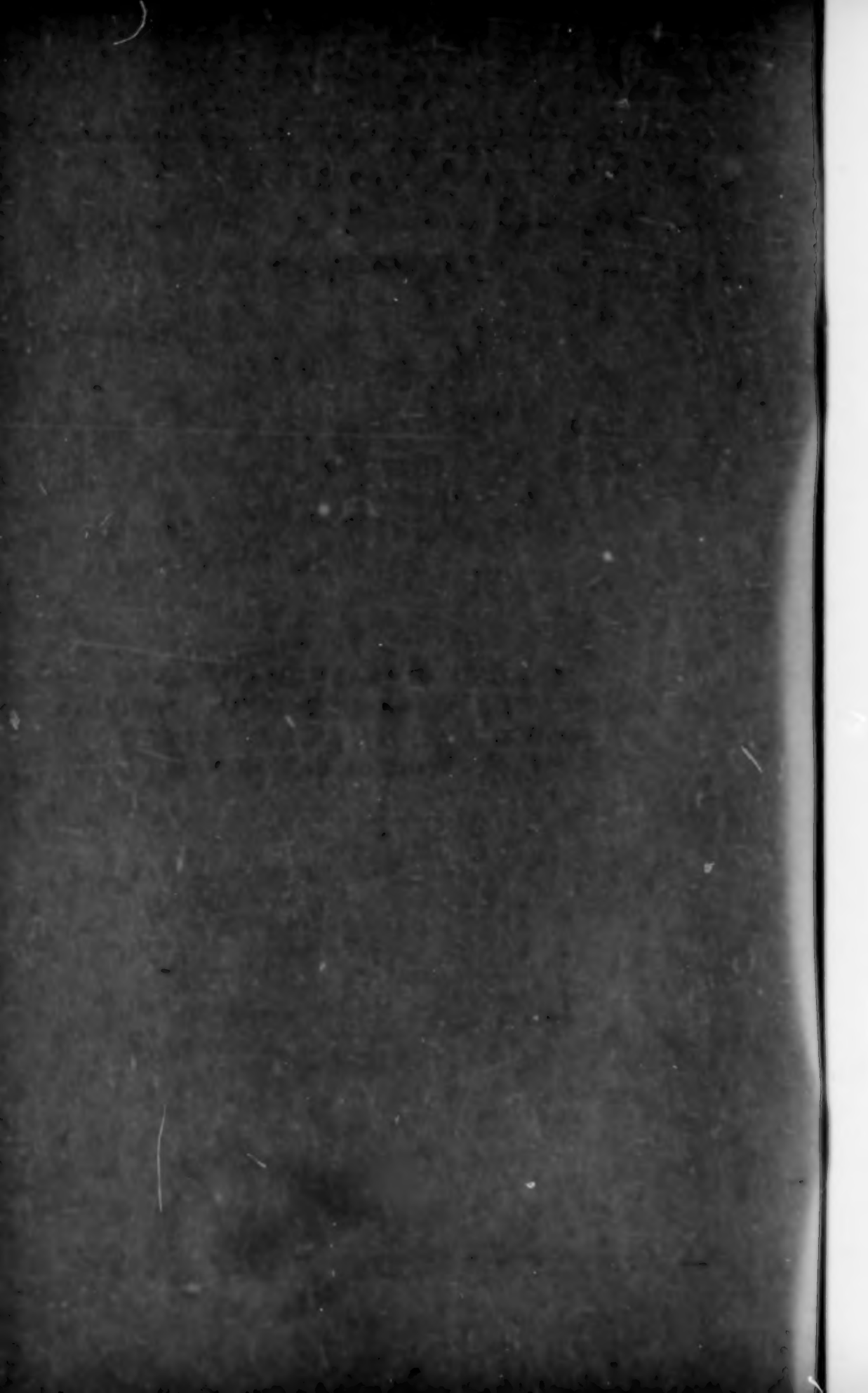
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August 3, 1987



No. 86-228

In The
Supreme Court of the United States
October Term, 1986

Juozas Kungys Petitioner,

vs.

United States of America,
Respondent.

MOTION OF THE BALTIC-UKRAINIAN-AMERICAN
COMPACT, ET AL. FOR LEAVE TO FILE A BRIEF
AMICI CURIAE IN SUPPORT OF PETITIONER

The Baltic-Ukrainian American
Compact, the Coalition for Constitutional
Justice—and Security, the American-
Lithuanian Rights Fund, Inc., the
Estonian-American National Council, Inc.,
the Ukrainian-American Justice Committee,
the Americans for Human Rights in Ukraine,
and the Ukrainian National Center: History
and Information Network, hereby move for
leave to file the attached brief amicus

curiae supporting petitioner in Kungys v. United States, No. 86-228.

Amici are organizations who represent or whose members include naturalized United States citizens of Estonian, Latvian, Lithuanian and Ukrainian descent. A group of similar organizations previously obtained written consent, filed with the Clerk of the Court, from both petitioner and respondent for the filing of an amici curiae brief in support of the Petition for Certiorari. See Brief and Appendix Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. The interests of the current amici are identical to those of the amici who obtained previous written consent. Three of the amici herein represented -- the Coalition for Constitutional Justice and Security, the Estonian-American National

Council, and the Ukrainian American Justice Committee -- were part of the group which obtained prior consent. Since the remaining four amici were not, this motion is necessary.

The background and concerns of amici are fully set forth in the Interest of Amici Curiae section of the attached brief. On the basis of the interest there set forth, amici respectfully seek the Court's leave to file the attached brief on the merits.

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
MOTION OF THE BALTIC-UKRAINIAN-AMERICAN COMPACT, ET AL. FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER	i
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	4
A. The Unique Nature of Petitioner's Case	4
1. The Prosecution of War Crimes Cases in a Civil Setting	4
2. The Government's Reliance on Soviet Supplied Evidence Where the Soviets Have a Motive to Fabricate	8
B. The History Underlying The Soviet Interest In These Cases.....	13
C. The Pressure of Circumstances of Post-War Europe Compelled Many Individuals To Misrepresent Identifying Information In Their Immigration Applications Consistent With False Documents They Had Obtained In Order To Survive During the War Years	20
D. Unlike the Other "War Crimes" Denaturalization Cases Previously Before This Court, Petitioner Was Not Found To Have Participated In the Persecution of Civilians	25

ARGUMENT	28
1. THE STRICT <u>CHAUNT</u> MATERIALITY STANDARD SHOULD BE MAINTAINED AND APPLIED TO ALL FALSE TESTIMONY PROVISIONS OF THE IMMIGRATION AND NATURALIZATION ACT WHICH ARE RELEVANT TO DENATURALIZATION PROCEEDINGS	28
A. The <u>Chaunt</u> Standard of Materiality Should Not Be Diluted or Abandoned As Urged by The Government	29
B. The "False Testimony" Provision of 8 U.S.C 5 1101(f)(6) Requires That the False Testimony Concern a Material Fact and be Given With the Specific Intent to Deceive .	33
CONCLUSION	36

TABLE OF AUTHORITIES

Page

CASES:

<u>Chaunt v. United States</u> , 364 U.S. 350 (1960)	29, 32
<u>Fedordenko v. United States</u> , 449 U.S. 490 (1981)	11, 26
<u>Linnaas v. I.N.S.</u> , 790 F.2d 1024 (2d Cir.), <u>cert. denied</u> , 93 L.Ed.2d 600 (1986)	14
<u>United States v. Linnaas</u> , 527 F. Supp. 426 (E.D.N.Y.), <u>aff'd</u> , 685 F.2d 427 (2d Cir.), <u>cert. denied</u> , 459 U.S. 883 (1982)	11, 26

STATUTES AND REGULATIONS:

8 U.S.C. § 1101 et seq. (1986)	5
§ 1101(f)(6)	33, 34, 35
§ 1182(a)(19)	33, 34
§ 1251(a)(19)	6
§ 1253(h)	6
§ 1254(e)	6
§ 1451(a)	28, 29, 33, 34
Pub. L. 95-549, §§ 101-105, 92 Stat. 2065 (1978)	5

MISCELLANEOUS:

Cowles, <u>Universality Jurisdiction Over War Crimes</u> , 33 Cal. L. Rev. 177 (1945)	7
H.R. 6611, 96th Cong., 2d Sess. (1979)	21
Kaslas, <u>La Lithuanie et La Seconde Guerre Mondiale</u> (1980)	23
"Mass Deportations of Populations from the Soviet Occupied Baltic States," Estonia Information Centre, Stockholm, Sweden (1981)	23
<u>Report of the Commission of Inquiry on War Criminals</u> , Ottawa, Canada (Dec. 30, 1986)	6
S. 2580, 96th Cong., 2d Sess. (1979)	21
"Soviets Execute Ex-Nazi Guard," <u>The Washington Post</u> , p. A10 (July 28, 1987)	9
"Soviet Execute Nazi Fedorenko," <u>The Washington Times</u> , p. A7 (July 28, 1987)	10
Stromas, "Political and Legal Aspects of the Soviet Occupation and Incorporation of the Baltic States, 1 <u>Baltic Forum</u> 26 (1984)	22
<u>1983 Statistical Year book of the Immigration and Naturalization Service, U.S. Department of Justice</u>	3
U.S. Department of State, <u>Nineteenth Semiannual Report by the President to the Commission on Security and</u>	

<u>Cooperation in Europe (CSCE),</u>	
<u>Implementation of the Helsinki</u>	
<u>Final Act, April 1, 1985 - October</u>	
<u>1, 1985 (1985)</u>	13

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INTEREST OF AMICI CURIAE

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Justice and Security, the American-
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the Americans for Human Rights in Ukraine,
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which represent or whose members include naturalized United States citizens of Estonian, Latvian, Lithuanian, and Ukrainian descent. Many of these individuals are former refugees or displaced persons who fled from their homelands before the advancing Soviet armies towards the end of World War II. They subsequently were unable to return to their homelands after the War for fear of political persecution by the Soviets, and eventually obtained immigration visas from United States Consulates in Germany and Austria for entry into this country.

Two-thirds of the denaturalization proceedings that have been brought by the Justice Department Office of Special Investigations have been against Americans of Baltic and Ukrainian descent. Yet, only 26 % of the total displaced persons admitted into the United States after World War II were of Baltic or Ukrainian

descent. See 1983 Statistical Yearbook of the Immigration and Naturalization Service, U.S. Dept. of Justice, Table 6B. These prosecutions have been based upon information and "evidence" provided by the Soviet Union, a totalitarian government which has a strong interest in discrediting Baltic and Ukrainian emigres because they help perpetuate the nationalistic commitment of those who remain in the Soviet-occupied Baltic and Ukrainian territories, and otherwise seek an end to Soviet occupation. Amici therefore have a strong interest in ensuring that the immigration law issues in this case are decided in a way which does not allow the Soviet Union to manipulate those laws to its own political ends and at the expense of Baltic and Ukrainian Americans who are innocent, notwithstanding suspect Soviet evidence, of participation in the war crimes of Nazi Germany.

Many Baltic and Ukrainian emigres were either themselves victims of persecution during the German occupation, or had family or friends executed by the Nazis. Thus, ultimately, it is the interest of amici that Nazi war criminals within U.S. borders be brought to justice. At the same time, amici wish to ensure that such justice is not obtained through a misreading or misapplication of our immigration laws, particularly where it undermines our commitment to the constitutional rights of the accused.

STATEMENT OF THE CASE

A. The Unique Nature of Petitioner's Case

1. The Prosecution of War Crimes Cases in a Civil Setting

Petitioner's case was prosecuted by the Office of Special Investigations ("OSI"), an office established by the Attorney General in 1979 within the Criminal Division of the United States

Department of Justice. All "war criminal" files opened by the Immigration and Naturalization Service were transferred to OSI at that time. The establishment of OSI and its pursuit and prosecution of accused Nazi war criminals was largely a result of the impetus which the so-called "Holtzman amendment," Pub. L. 95-549, §§ 101-105, 92 Stat. 2065 (1978), to the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 et seq. (1986), along with related appropriation measures, gave U.S. efforts to identify and deport Nazi war criminals found within its borders.

It is significant to note that the Holtzman amendment did not attempt to bring Nazi war criminals to justice by conferring qualified jurisdiction on United States courts or seeking to set up a special international tribunal to try and punish these individuals for their crimes in a manner consistent with

American standards of criminal justice. Instead, the amendment relied exclusively on the tool of denaturalization and deportation to deal with such individuals. In essence, the amendment requires the deportation, or exile, of persons shown to have participated in Nazi persecution during World War II, and eliminates the Attorney General's power to grant such persons discretionary relief. In other words, the deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result. See 8 U.S.C. §§ 1251(a)(19), 1253(h), and 1254(e).

In contrast, the Canadian government has opted to follow the recommendations of its Deschenes Commission Report, (See Report of the Commission of Inquiry on War Criminals, Ottawa, Canada, December 30, 1986) which concluded that all war criminals within its borders, not just

Nazi war criminals, should be apprehended, tried and punished under Canadian rules of criminal procedure. The Canadians intend to assert criminal jurisdiction over such individuals under the "universality principal." See generally, Cowles, Universality Jurisdiction Over War Crimes, 33 Cal. L. Rev. 177 (1945).

Regrettably, the net effect of the approach taken by the Holtzman amendment has been to allow OSI to try what amount to capital cases in a civil setting, without providing the defendants with any of the safeguards that they would normally be afforded in a criminal trial, or even in an extradition proceeding. Among the more important safeguards which are lacking in these "war crimes" denaturalization cases are the right to a jury trial and the requirement that the government prove guilt beyond a reasonable doubt. Perhaps most importantly, in

contrast to criminal cases, a defendant's refusal to testify in a denaturalization case is construed against him. Petitioner attempted to gain one of these safeguards by filing a motion for a jury trial. The motion was denied by the District Court, however, and that issue was not addressed by the Court of Appeals (Pet. for Cert. at 9 n.3).

2. The Government's Reliance on Soviet Supplied Evidence Where the Soviets Have a Motive to Fabricate

Compounding the lack of due process safeguards commensurate with the serious consequences of these unique denaturalization proceedings, is the fact that, in a majority of its cases, OSI has relied almost entirely on the cooperation of the Soviet government to provide it with evidence to identify alleged war criminals and to support its cases for denaturalization. This fact was not lost upon the District Court:

The prosecution of this case results from an unusual cooperative effort of the Office of Special Investigations ("OSI") and Soviet authorities. The Soviet authorities have provided documents from archives under their control and, more important, they have assembled, interrogated and produced for deposition the witnesses whose testimony is critical if the government's principal charges are to be sustained.

(Pet. App. 86a-87a). In fact, OSI has relied on Soviet "evidence" in two-thirds of its cases. A recent press report indicates that the Soviet news agency Tass reported that the Soviet procurator's office has provided 150 names to the United States over the last 10 years. "Soviets Execute Ex-Nazi Guard," The Washington Post, p. A10 (July 28, 1987).

All of these Soviet-backed cases have been brought against Baltic and Ukrainian emigres. The Soviet "evidence" purports to establish the voluntary participation of these emigres in the killings of the Baltic and Ukrainian

Jewish population and Soviet citizens under the direction of the Germans. The fate of two individuals who were deported to the Soviet Union after denaturalization proceedings successfully prosecuted by OSI on the basis of Soviet evidence demonstrate the gravity of the results of in such cases. As recently reported in the national press, see e.g. "Soviets execute Nazi Fedorenko," The Washington Times, p. A7, July 28, 1987, Fyodor Fedorenko was executed by the Soviets after a Soviet "trial" ^{1/} for war crimes,

^{1/} As found by the District Court, "[c]ases involving charges of war crimes were and are treated by Soviet authorities as political cases" (Pet. App. 93a). Political cases generally involve inhabitants of ethnic republics seeking independence, religious persons, and political dissidents (Pet. App. 91a). Such cases are only nominally controlled by codes of criminal procedure; they are subject to party control and investigated by the KGB (Pet. App. 91a). In political cases, "reliance [can] not be placed on the formal safeguards written into Soviet law to protect a defendant" (Pet. App. 90a). While testimony and other evidence in such cases are not necessarily false, (continued)

see Fedorenko v. United States, 449 U.S. 490 (1981); and Karl Linnas died after undergoing two operations at the hands of Soviet prison doctors. See United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y.), aff'd, 685 F.2d 427 (2d Cir.), cert. denied, 459 U.S. 883 (1982); and Linnas v. I.N.S., 790 F.2d 1024 (2d Cir.), cert. denied, 93 L.Ed.2d 600 (1986).

In the case at bar, however, much of the evidence provided by the Soviets was excluded by the District Court as unreliable. The District Court specifically found that the Soviet government had a strong motive to discredit Baltic emigres in order to legitimize its hold upon the occupied

"where the evidence does not support the desired results there is intense pressure to remold it" (Pet. App. 92a). These findings were based upon the credible and uncontroverted testimony of former KGB members and Soviet lawyers who described how the Soviet legal system works in practice (Pet. App. 86a-95a).

Baltic states. In fact, uncontroverted evidence presented by the petitioner demonstrated that the Soviet Union has taken steps "to counter the influence of emigres from the Baltic states" (Pet. App. 87a). One such step was the establishment of a KGB agency in Latvia called "Motherland's Voice." Motherland's Voice disseminated

propaganda designed to discredit Latvian emigres abroad by characterizing them as war criminals or collaborators during the German occupation or by characterizing them as acting under orders of western intelligence agencies. Sometimes the charges were true; sometimes they were fabricated.

(Pet. App. 88a). Another KGB agency with a similar mission was the Latvian Committee for Cultural Relations of Latvians abroad:

Its objective was also to discredit Latvian emigres, particularly those who actively sought the end of the Soviet occupation. This was accomplished by publication of books and articles purporting to describe the war crimes and collaboration of which emigres were guilty. The

facts were often embellished and supplemented with forged documents, false testimony and pure invention. When [former KGB agent Lesinskis, a chairman of the Committee's presidium,] was assigned to a post in the United States, [his] job was to obtain information about Latvian communities abroad, to promote discord within them and to discredit their leaders. All of this was a KGB function.

(Pet. App. 88a) (Emphasis added).

A similar KGB agency exists for Lithuania.

Id. 2/

B. The History Underlying the Soviet Interest In these Cases

At various points in its opinion, the District Court took note of the historical background of the alternating Soviet and German invasions and occupations of Lithuania which gave rise

2/ The Soviets engage in the same kind of propaganda activities against Zionists, accusing them of having collaborated with the Nazis to send innocent Jews to their death. See U.S. Department of State, Nineteenth Semiannual Report by the President to the Commission on Security and Cooperation in Europe (CSCE) on the Implementation of the Helsinki Final Act, April 1, 1985 - October 1, 1985 (1985) at 13.

to this Soviet interest in discrediting Lithuanian and other Baltic emigres. Because of its importance to understanding the potential impact of the Court's ruling on the issues now before it, we set forth the pertinent portions of that history as recited by the District Court:

For centuries Lithuania, like the other Baltic states, has been in the path of conquerors from the east and from the west, see, e.g., Massi, Peter the Great (Alfred A. Knopf 1980); Hatton, Charles XII of Sweden (Weybright and Lalley 1968). Once extending from the Baltic to the Black Sea, Lithuania ceased to exist as a nation altogether in 1795 at the time of the Third Partition of Poland by Russia and Prussia.

At the time of the Russian Revolution in 1917 Lithuania was occupied by Germany. It declared and achieved its independence on February 16, 1918. During the interwar years, according to documents submitted by the government in this case, Lithuania looked primarily to France and England for cultural, political and military resources.

The years 1939-40 marked the extinction once again of independent Lithuania. Nazi Germany, having absorbed Czechoslovakia's Sudetenland after the Munich Pact,

occupied Czechoslovakia's principal provinces of Bohemia and Moravia on March 15, 1939. On March 23 Germany seized, without resistance, Lithuania's City of Memel. Preparations then began for the invasion of Poland, scheduled for September 1.

Seeking to avoid fighting simultaneously against major powers on the east and the west, Germany entered into negotiations with the Soviet Union. On August, 1939 the German-Soviet Non-Aggression Pact was signed. Discovered after the War in German archives were the secret protocols in which Germany and the Soviet Union divided between them Poland and the Baltic states. At that time Lithuania was allocated to Germany, Latvia and Estonia to the Soviet Union.

Thus secured against the Soviet Union in the East, Germany attacked Poland on September 1, rapidly overcoming the Polish armed forces. On September 17, implementing the secret protocols, the Soviet Union invaded Poland. On September 28 Germany and the Soviet Union executed a German-Soviet Boundary and Friendship Treaty, establishing their common frontier in Poland. Another secret protocol added Lithuania to the Union's share of the seized territory. Later in 1939 the Soviet Union invaded Finland. In June 1940 Lithuania was occupied by and in due course incorporated into the Soviet Union. Its brief period of independence came to an end.

Lithuania was a predominantly Roman Catholic country. The political and social reorganization of the nation required to transform it into a Soviet province entailed deportation of political and business leaders, intellectuals and Catholic priests.

(Pet. App. 47a-48a).

* * *

On June 22, 1941 Germany launched a massive attack upon the Soviet Union at all points along the lengthy frontier. Army Group North [the German Army Group assigned to attack through the Baltic states with the objective of capturing Leningrad] moved into Lithuania and the other Baltic countries which the Soviet Union had occupied pursuant to the secret protocols of the 1939 Non-Aggression Pact and Boundary and Friendship Treaty between it and Germany. Einstazgruppen A [the German SS units organized to annihilate the Jewish population in the east] under [Brigadier General] Stahlecker followed close at its heels.

As the Soviet occupation forces retreated, groups of Lithuanians organized to attack them and to aid in securing self rule once again. Efforts were made to establish a provisional Lithuanian government, efforts which were quickly terminated by the German authorities.

At the outset, at least, many Lithuanians viewed the Germans as

liberators from Soviet oppression, a view which facilitated the Germans' plan to use the Lithuanians for their own ends.

(Pet. App. 51a-52a).

* * *

Unlike the prospects faced by the resistance movements in the western nations conquered by Nazi Germany, in Lithuania the defeat of Germany did not ensure return to independence. Rather it was quite likely that Germany's defeat would simply result in the reinstatement of Soviet tyranny and religious oppression. Nevertheless, a resistance movement arose which opposed both the German occupation and renewed Soviet rule. This took place during the period from 1941 through mid-1944. During the early part of that period the Germans were enjoying staggering military successes in the Soviet Union, conquering vast territories and inflicting huge losses upon both military personnel and civilians. During the latter part of the period the Soviet Union inflicted similar losses and defeats upon the German armies driving them back towards Poland and the Baltic states. At the the same time the western forces mounted offensives in Africa, Sicily and Italy and prepared for the cross-Channel invasion of France. During all that time the Nazis pursued their goal of killing the remaining Jews of eastern Europe and the Jews of western Europe, establishing the death camps in

Poland and Germany.

(Pet. App. 65a).

* * *

On April 25 [1945] units of the American and Soviet Armies met at the Elbe River. The partition of Germany and Berlin into the Soviet, American, British and French zones was effected. Poland and the Baltic states were occupied by Soviet troops. Although a truncated Poland allied with the Soviet Union emerged from the War, the Soviet Union proceeded to incorporate into itself Lithuania and the other Baltic states.

(Pet. App. 68a).

* * *

Many thousands of Lithuanians fled the country as the Soviet army approached in 1944. No doubt a number of these refugees were persons who had collaborated with the Germans and some no doubt had participated in the killing of Lithuania's Jewish population. Many thousands were not guilty of such offenses and of that number at least some had engaged in resistance to the German regime. These thousands fled from a renewed Soviet tyranny and frequently to avoid possible execution or deportation.

Despite Soviet conquest there remain strong nationalistic feelings and continuing allegiance by a significant portion of the

population to the Roman Catholic Church. The attempts by Soviet authorities to stamp out these influences and to create the myth of historic friendship between the people of the Soviet Union and its various national groups are weakened by the presence abroad of large groups of emigres who experienced personally the effects of Soviet occupation and who help keep alive Lithuanian national and religious convictions.

(Pet. App. 87a)

* * *

The Soviet Union's seizure and continued occupation of Lithuania has been accomplished by force, executions, deportation of Lithuanians and resettlement of non-Lithuanians in Lithuania.

(Pet. App. 89a).

On the basis of this historical background, and the uncontroverted testimony of former KGB agents describing specific Soviet steps and programs to discredit Baltic emigres, the District Court found that "the Soviet Union's particular interests are served when a United States court finds that an emigre participated in the slaughter of Jewish

citizens or otherwise collaborated with the Germans" (Pet. App. 90a).

C. The Pressure of Circumstances of Post-War Europe Compelled Many Individuals To Misrepresent Identifying Information In Their Immigration Applications Consistent With False Documents They Had Obtained In Order to Survive During the War Years

Under the exigent circumstances of World War II Europe and Russia, many of the thousands of refugees and displaced persons from the Baltic states and Ukraine obtained identification documents which were false in some respect, such as in date and place of birth, in order to avoid consequences which would otherwise befall them from the German authorities who were occupying their territories at the time. These consequences ranged from conscription into units of the German army, to removal to a concentration camp. This was true not just of refugees from the Baltic and Ukrainian areas, but also of a substantial number of the

millions of displaced persons throughout Europe, Jews and non-Jews alike. Petitioner was among such refugees.

When applying for immigration to the United States, many refugees and displaced persons with false identification documents, who were not otherwise disqualified in any way from obtaining a visa, falsely swore to the truth of the identifying documents and the information they contained about date and place of birth. These misrepresentations were made under the force of unique circumstances of post-war Europe. 3/

3/ In fact, in 1979, two bills were introduced in the House and Senate which acknowledged this problem faced by displaced persons who lied about their age on immigration forms because they had obtained false identifying documents during the War in order to survive. See H.R. 6611, 96th Cong., 2d Sess. (1979), and S. 2580, 96th Cong., 2d Sess. (1979). The bills sought to permit such persons to amend their certificates of naturalization to reflect their true date of birth so that they would become eligible for social security benefits.

In the case of Baltic and Ukrainian refugees, such misrepresentations were made out of a very real fear of persecution if they were repatriated to their Soviet-occupied homelands. Many refugees had witnessed first-hand the oppression of the Soviets during the Russian occupation of 1940-1941, when many lost relatives or friends who were either killed or deported by the Russians. 4/ See Brief and Appendix of Amicus Curiae in Support of Pet. for Cert. at 4a-6a and 13a. One of the last acts of the Soviets in the Baltic states before the invasion of Germany in 1941 was the deportation of 60,000 to 70,000 people in a single weekend, June 14-15, 1941, in cattle cars

4/ For example, "[f]rom July 1940 to June 1941, Soviet authorities carried out massive arrests and deportations. As many as 150,000 people were deported to Siberia and Central Asia." Shtromas, "Political and Legal Aspects of the Soviet Occupation and Incorporation of the Baltic States," 1 Baltic Forum, 26, 44 (1984).

to forced labor camps in Siberia, never to be seen or heard from again. See "Mass Deportations of Populations from the Soviet Occupied Baltic States," Estonia Information Centre, Stockholm, Sweden (1981).

Repatriation, therefore, posed a substantial threat to Baltic and Ukrainian refugees. An unknown number of Balts and Ukrainians were actually deported from the camps into Soviet hands, and press reports of attempts at forced repatriation were discussed throughout the camps. See e.g. Kaslas, La Lithuanie et La Seconde Guerre Mondiale, at 194-197 (1980). The Allies also allowed groups of Soviet representatives to enter the camps, in what became known as "Operation Keelhaul," to try to persuade Balts and Ukrainians to return to their homelands. This in turn created fears that the Allies were abandoning their commitment that Balts and

Ukrainians would not to be repatriated involuntarily. All of this created pressure on the refugees to try to immigrate as soon as possible.

It was against this background that the thousands of refugees who had false identity documents determined that they had no alternative but to write consistent information on their immigration forms for fear that telling the truth would prevent their immigration and result in their imminent repatriation to the Soviet Union. Fear of telling the truth was based in large part on the fact that the language barrier (most refugees had to communicate to immigration officials through an interpreter) significantly increased the chance that they would not be able to adequately explain the reasons why they had to obtain a false identification document during the War. Reinforcing this was the general fear of

authority instilled in displaced persons during the War, many of whom witnessed the constant abuse of authority at the expense of the life or liberty of those who trusted that authority.

D. Unlike the Other "War Crimes" Denaturalization Cases Previously Before This Court, Petitioner Was Not Found To Have Participated In The Persecution Of Civilians

Although petitioner was charged with participation in the persecution of civilians in Lithuania during the War as a ground for denaturalization pursuant to the Holtzman amendment, the District Court found that the government had not met its burden in proving that Kungys had participated in the Kedainai killings as alleged. The District Court made this finding because it found that Soviet evidence upon which the government relied to prove this allegation was unreliable and could not be credited as truthful (Pet. App 106a-109a).

This is in contrast to the cases of Fedorenko v. United States, supra., and United States v. Linnas, supra. In Fedorenko, the Court found that it was undisputed that the defendant was an armed guard at the Treblinka concentration camp in Poland. Fedorenko v. United States, 449 U.S. at 494. In Linnas, the defendant was found by the court to have been the Chief of the Nazi concentration camp in Tartu, Estonia. The district court concluded from the evidence at trial that it was "beyond dispute that defendant, Karl Linnas, 'assisted the enemy in persecuting civilian populations of countries.'" United States v. Linnas, 527 F.2d at 439. Thus, in both Fedorenko and Linnas, the trial courts found the ultimate disqualifying facts that the defendants had participated, whether voluntarily or involuntarily, in the persecution of civilians as part of the

finding that the defendants had unlawfully obtained entry into this country through material misrepresentations.

Although the District Court found no credible evidence that petitioner had participated in war crimes, the Court of Appeals held that petitioner was nevertheless subject to denaturalization because he did not tell the truth about his date and place of birth when applying for a visa and for naturalization (Pet. App 36a-37a). The Court held this even though the government had not proved any fact which would have disqualified petitioner from obtaining a visa. The practical result of the Court of Appeals ruling is that where a war crimes denaturalization case is prosecuted on the basis of Soviet evidence found to be unreliable, the defendant can be stripped of his citizenship, and eventually deported to the Soviet Union were he faces

almost certain death, on the basis of the government proving nothing more than his having lied on his immigration and naturalization forms about his date and place of birth.

ARGUMENT

- I. THE STRICT CHAUNT MATERIALITY STANDARD SHOULD BE MAINTAINED AND APPLIED TO ALL FALSE TESTIMONY PROVISIONS OF THE IMMIGRATION AND NATURALIZATION ACT WHICH ARE RELEVANT TO DENATURALIZATION PROCEEDINGS
-

The Court has restored this case to the calendar for reargument, directing the parties to file briefs addressing several questions concerning the standards for materiality of false statements forming the basis of an order of denaturalization under 8 U.S.C. § 1451(a). Amici do not wish to repeat the many strong arguments on these issues made in petitioner's brief. Amici will focus instead on how the unique nature of petitioner's case underscores the importance of maintaining

the strict standard of materiality set forth in Chaunt v. United States, 364 U.S. 350 (1960), regardless of how the government attempts to denaturalize a citizen under section 1451(a).

A. The Chaunt Standard Of Materiality Should Not Be Diluted Or Abandoned As Urged By The Government

The government has argued in favor of the diluted standard of materiality adopted by the Court of Appeals, or, in the alternative, has urged this Court to replace the Chaunt test with the weaker "capacity to influence" standard applied in cases under the false statement statutes in the criminal code (Br. for U.S. 16-29). The Court should reject both arguments.

It is disingenuous at best for the Government to argue that it is anomalous to require a more exacting standard of materiality in a denaturalization case than in a criminal case where the

defendant's liberty is at stake. Id. at 27-28. As indicated above, the government prosecuted what amounts to a war crimes case against petitioner under the denaturalization statute. The prosecution was initiated on the basis of Soviet evidence which was eventually rejected as suspect by the District Court because of the strong Soviet motive to discredit petitioner. Yet, notwithstanding the fact that the government did not prove that petitioner participated in persecution of civilians, the Court of Appeals is prepared to permit denaturalization simply on the basis of petitioner's misrepresentation about his date and place of birth. If that decision is allowed to stand, petitioner would eventually be

deported to the Soviet Union. 5/ There he would be given a "show trial," and, since it is unlikely that the Soviets will be as critical of their own evidence as the District Court was, he will be executed like Fedorenko and Linnas who have gone before him. But unlike Fedorenko and Linnas, petitioner will be handed over to the Soviets courtesy of U.S. denaturalization proceedings which never resulted in a finding that he was a war

5/ Although the Attorney General may still have discretion to stay deportation since petitioner has not been found to be a persecutor, "hydraulic" political pressure would in all likelihood prevent such a stay. Also, the experience of Karl Linnas during his deportation proceedings indicates that other countries will be subject to the same political pressure and will be unwilling to accept petitioner simply because he was accused of being a war criminal. Finally, the Soviets pressured the United States to turn Linnas over to them without delay -- after all, the principal goal of Soviet cooperation has been to return these individuals to their custody for trial, and to do so in a way, of course, which avoids the encumbrance of abiding by an extradition treaty, since the Soviets have not signed such a treaty with the United States.

criminal. Stripping petitioner of his citizenship under these circumstances is tantamount to a death sentence without any judicial finding of his having committed a capital crime. It is the equivalent of a death sentence for telling a lie. Where loss of citizenship can lead to these kind of results, there is certainly no anomaly in requiring a greater showing for materiality than the mere speculative test of whether a misrepresentation has "the capacity to influence" the INS.

Accordingly, amici associate themselves fully with the arguments made by petitioner that the Chaunt test requires proof of a fact disqualifying a defendant from immigration or citizenship before a misrepresentation of information, which would have led to the discovery of such a fact upon investigation, can be considered material (Br. for Pet. 9-20). The materiality standard of Chaunt should

only be abandoned if it is construed as requiring less than such a showing by the government.

In addition, a requirement that citizenship be "procured by" the material misrepresentation must also be considered part of the government's burden under section 1451(a), since Congress has required a "procurement" showing in order to disqualify an alien making a material misrepresentation from obtaining a visa. See 8 U.S.C. § 1182(a)(19). It would stand immigration policy on its head to make the government's burden easier in stripping someone of his citizenship than it is in denying an alien a visa.

B. The "False Testimony" Provision of 8 U.S.C. § 1101(f)(6) Requires That The False Testimony Concern A Material Fact And Be Given With The Specific Intent To Deceive

The government has argued that petitioner is also subject to denaturalization under section 1451(a) for

want of good moral character as defined in 8 U.S.C. § 1101(f)(6) (Br. for the U.S. at 45-48). It argues that under the latter section, false testimony "for the purpose of obtaining benefits" under the immigration laws can disqualify a person from citizenship, regardless of whether it is material.

However, wherever Congress sought to deny a person benefits, or revoke his benefits, under the immigration and naturalization laws on the basis of a willful misrepresentation, it has required that the misrepresentation concern a material fact. See 8 U.S.C. §§ 1451(a) and 1182(a)(19). For this reason, we agree with the ruling by the Court of Appeals that the government cannot avoid the materiality requirement by seeking to denaturalize under section 1101(f)(6) (Pet. App. 25a-28a).

In any event, the government here has not established that petitioner's misrepresentations were "for the purpose of obtaining benefits under this chapter. This is a specific intent requirement written explicitly into section 1101(f)(6). The government must prove the petitioner's state of mind, his "purpose" in making the misrepresentation. As in any judicial proceeding where it is an issue, intent is a question of fact which must be proven by evidence introduced by the party carrying the burden of proof. No such evidence was produced by the government here. All it can muster is the unsupported claim that petitioner's misrepresentations about his date and place of birth "were clearly for the purpose of obtaining benefits under the immigration laws" (Br. for the U.S. at 46). This falls far short of the burden it must carry to show petitioner's state

of mind, his "purpose" or intent, in misstating these facts.

CONCLUSION

For the foregoing reasons, amici urge this Court to reverse the decision of the Court of Appeals, and remand the case with the direction that it be dismissed.

Respectfully submitted,

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